

HART'S
INTRODUCTION
TO THE LAW OF
LOCAL GOVERNMENT
AND ADMINISTRATION

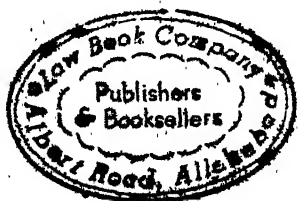
HART'S INTRODUCTION TO THE LAW OF LOCAL GOVERNMENT AND ADMINISTRATION

THIRD EDITION

BY

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PREFACE TO THE THIRD EDITION

TIME and the war have made a further edition essential, for large numbers of students are returning from the Forces and have now to pick up the threads laid down years ago.

The death of Sir William Hart and the absence abroad of his son have necessitated the preparation of the present edition by a stranger. An attempt has been made, however, to retain the style and arrangement of previous editions and to limit the changes to bringing the material up to date, or as up to date as is possible during the present flood of new legislation.

The major changes have been necessitated by the Local Government (Boundary Commission) Act, 1945 (in Chapter III), by the Town and Country Planning Acts, 1943 and 1944 (in Chapter XXII), and the Education Act, 1944 (in Chapter XXVII), but many other Acts have been noted throughout the book. In present circumstances it is physically impossible to ensure the inclusion of every change in the law, and several further Bills affecting local government are now before Parliament (*e.g.* the Police and Education Bills), whilst other legislation may be expected within the new few months in furtherance of the Government's extensive programme. Readers should, therefore, take care to ascertain that any information given is the final word on that subject.

Especial thanks are due to Mr. H. Oswald Brown, LL.B., Clerk of the Norfolk County Council, who has most kindly read the proofs and has made many valuable suggestions, and to the Publishers, without whose unfailing help completion of the new edition would have been most difficult.

D. J. B.

March 1946.

PREFACE TO THE SECOND EDITION

NEW legislation, especially in view of the adoption of this book for the Law Society's Final Examination, has necessitated a second edition. The Public Health Act, 1936, and the Housing Acts of 1935 and 1936, have involved major alterations, while such legislation as the Restriction of Ribbon Development Act, 1935, the Trunk Roads Act, 1936, the Local Government (Financial Provisions) Act, 1937, the Air-Raid Precautions Act, 1937, and the Fire Brigades Act, 1938, required notice. The Appendix, appearing in the first edition and dealing with the historical development of the prerogative writs of *certiorari* and prohibition, has been omitted as unsuitable in a work of the present nature. Lastly, in accordance with the desire of the publishers, references have been added to the English and Empire Digest. The result of these changes has been to add some forty pages to the book.

Writers on local government law almost invariably find themselves embarrassed by the appearance of their works on what proves to be the threshold of some further legislative change. In this respect it is hoped that the present edition has been fortunate. Parliament has taken time by the forelock and passed two measures of importance which are not to come into force until a later date. In the case of the Administration of Justice (Miscellaneous Provisions) Act, 1938, which comes into operation on 1st January, 1939, the changes to be effected have been anticipated and incorporated in the text as if already in force. The Food and Drugs Act, 1938, which is not to come into operation until 1st October, 1939, has been dealt with differently. The length of the interval before the new law comes into force seemed to justify retaining the present law in the text and referring to the projected changes in footnotes. A further measure, the Limitation Bill, which proposes to make alterations in the Public Authorities Protection Act, 1893, is still before Parliament. As the Bill, if passed, will not come

into force before the 1st January, 1940, reference to it has been confined to a footnote.

It is hoped that various imperfections, which critics kindly pointed out in the first edition, have been removed.

W. E. H.

W. O. H.

August 1938.

PREFACE TO THE FIRST EDITION

THE writing of this book was originally inspired by the belief that there was need for a work on local government which could serve as an introduction to the subject for law students intending to enter the ranks of those engaged in local administration. At the same time it was realised that the subject so treated might appeal to a wider class of reader; there are many members and officers of local authorities and other persons desirous of knowing more of the subject who might be interested in the presentation from a fresh view-point of the existing system of local government in England and Wales.

With the first of these objects in mind the book deliberately emphasises the legal aspect of local government, but it makes no pretence to completeness. It attempts to answer rather the questions why local government takes the form that it does and how it operates than what is its subject-matter. Consequently emphasis is laid on the historical development of institutions and their practical working, and local authorities are more in evidence than the services they administer. At the same time in Part III a sketch of the scope embraced by the more important services is given.

When the greater part of the book was in manuscript the Report of the Chelmsford Committee, upon which the Local Government Act, 1933, is based, made it necessary to reconsider the earlier chapters, and it was found that the subject, while not greatly changed, appeared more ripe for logical statement now that what may be called the constitutional code of local authorities has been consolidated. The changes in the law made by this Act have been duly noted, and it is hoped that the book may gain in practical value as an introduction to this important Act.

Our acknowledgments are due to several gentlemen who have by their criticism and help greatly assisted our labours. In particular we must thank Mr. G. R. Y. Radcliffe, D.C.L.,

Principal of the Law Society's School of Law, who read a great part of the manuscript, Mr. R. H. Jerman, M.C., M.A., Town Clerk of Islington, and Mr. R. H. R. Tee, O.B.E., LL.D., Town Clerk of Hackney, for suggestions and information relating to the chapter on the Metropolis, Mr. F. L. Edwards, of the Ministry of Health, and Mr. H. Chambers, of the Ministry of Agriculture and Fisheries, who read the chapter on Rivers and Streams, Mr. Lawrence Richmond, O.B.E., Public Assistance Officer to the West Riding County Council, who, out of his wide knowledge of the Poor Law, gave us helpful advice on that subject, and Mr. Harold Gibbons, for assistance with the subject of private Bill legislation, which his experience of the duties of a Parliamentary Agent rendered peculiarly valuable. Some of the books we have referred to are mentioned in various footnotes. We would instance here the works of Beatrice and Sidney Webb, and the Memorandum submitted by Mr. I. G. Gibbon, C.B., C.B.E., D.Sc., Assistant Secretary of the Ministry of Health, to the Royal Commission on Local Government, works to which all writers on the subject must be especially indebted.

The responsibility for statements of facts and opinions is, of course, entirely our own.

W. E. H.

W. O. H.

March 1934.

THE ENGLISH AND EMPIRE DIGEST

The citation of each case in the text is followed by a reference to the volume, page and number at which the case appears in the Digest. Thus :

Acton Local Board v. Batten (1884), 28 Ch. D. 282 ;
41 Digest 5, 16.

HALSBURY'S COMPLETE STATUTES OF ENGLAND

In the table of statutes there is printed, immediately following the regnal year, a reference to the volume and page at which each Act appears in Halsbury's Statutes. Thus ;

11 Statutes 440.

THE ALL ENGLAND LAW REPORTS

In the text and the table of cases the citations of the reports of cases decided since the beginning of 1936 include a reference to the All England Law Reports. Thus :

A.-G. v. Todmorden Borough Council, [1937] 4 All E. R. 588.

TABLE OF CONTENTS

	PAGE
PREFACE TO THE THIRD EDITION	v
PREFACE TO THE SECOND EDITION	vii
PREFACE TO THE FIRST EDITION	ix
TABLE OF STATUTES	xv
TABLE OF CASES	xl

PART I

LOCAL AUTHORITIES

Chap. I.	Introduction	3
Chap. II.	Local Authorities	41
Chap. III.	Alteration of Areas	66
Chap. IV.	Representation	87
Chap. V.	The Practical Working of Local Authorities	121
Chap. VI.	Local Government Finance	151
Chap. VII.	Audit	195
Chap. VIII.	Bye-laws	213
Chap. IX.	General Powers of Local Authorities	225
Chap. X.	The Administration of Justice	240
Chap. XI.	The Metropolis	254

PART II

CENTRAL CONTROL OVER LOCAL AUTHORITIES

	Introduction	277
Chap. XII.	The Necessity of Legislative Control	281

	PAGE
Chap. XIII. The Acquisition of Powers . . .	292
Chap. XIV. Delegated Legislation . . .	317
Chap. XV. Central Administrative Control . . .	338
Chap. XVI. Local Government and the Law Courts	369
Chap. XVII. Judicial Control of Local Government .	378
Chap. XVIII. Administrative Law	401
Chap. XIX. Local Authorities in Litigation . . .	437

PART III

LOCAL GOVERNMENT SERVICES

	Introduction	465
Chap. XX.	Public Health	481
Chap. XXI.	Housing	516
Chap. XXII.	Town and Country Planning . . .	542
Chap. XXIII.	Highways, Streets and Bridges . . .	569
Chap. XXIV.	Rivers and Streams	617
Chap. XXV.	Police	638
Chap. XXVI.	Poor Law (Public Assistance) . . .	666
Chap. XXVII.	Education	693
Chap. XXVIII.	Trading Undertakings	739
Chap. XXIX.	Licensing.	773
APPENDIX	. . . . .	795

INDEX

TABLE OF STATUTES

References to Statutes apply to Halsbury's Statutes

	PAGE		PAGE
13 Edw. 1, St. 2, c. 6—11 <i>Statutes</i> 440. (Statute of Winchester, 1285) . . .	10, 639, 640	22 Car. 2, c. 12—9 <i>Statutes</i> 233. (Highways and Bridges Act, 1670) . . .	584
18 Edw. 1, c. 1—15 <i>Statutes</i> 48. (<i>Quia Emptores</i> , 1290) . . .	582	2 Will. & M., c. 8. (Quo Warranto, 1690)—	
23 Edw. 3. (Statute of Labourers, 1349) . . .	14, 15	s. 3 . . .	259
12 Ric. 2, c. 13. (Nuisances in Towns, 1388) . . .	482	3 Will. & M., c. 12. (Highways, etc., 1691) . . .	583, 584
11 Hen. 7, c. 2. (Vagabonds, 1495) . . .	780	8 & 9 Will. 3, c. 16. (Highways, 1697) . . .	580
22 Hen. 8, c. 5—9 <i>Statutes</i> 229. (Statute of Bridges, 1530) . . .	609, 613	12 & 13 Will. 3, c. 11. (Taxation, 1701)—	
23 Hen. 8, c. 5—17 <i>Statutes</i> 985. (Statute of Sewers, 1531—2) . . .	257, 482, 625	s. 18 . . .	781
25 Hen. 8, c. 10—17 <i>Statutes</i> 995. (Commissioners of Sewers Oath, 1533—4)—		1 Anne, St. 2, c. 14. (Distillation, etc., 1702) . . .	781
s. 1 . . .	625	1 Geo. 1, St. 2, c. 52. (Highways, 1715) . . .	584
31 Hen. 8, c. 8. (Statute of Proclamations, 1539) . . .	331	2 Geo. 2, c. 17. (Taxation, 1729) . . .	781
5 & 6 Edw. 6, c. 25. (Alehouses, 1552) . . .	781, 782	2 Geo. 2, c. 28—8 <i>Statutes</i> 1118. (Unlawful Games Act, 1729)—	
7 Edw. 6, c. 5. (Wines, 1553) . . .	781	s. 10 . . .	781
2 & 3 Ph. & M., c. 8. (Statute of Highways, 1555) . . .	17, 581, 582, 583	s. 11 . . .	782
5 Eliz., c. 13. (Highways, 1562) . . .	583, 584	10 Geo. 2, c. 17. (National Debt, 1736) . . .	781
29 Eliz., c. 5. (Continuance, etc., of Acts, 1587) . . .	583	10 Geo. 2, c. 22. (Watching, City of London, 1736) . . .	643
43 Eliz., c. 2—14 <i>Statutes</i> 477. (Poor Relief Act, 1601) . . .	17, 43, 152, 153, 666	12 Geo. 2, c. 29—13 <i>Statutes</i> 417. (County Rates Act, 1738) . . .	610
1 Jac. 1, c. 31. (Plague, 1603) . . .	483	31 Geo. 2, c. 31. (Supply, etc., 1757) . . .	781
21 Jac. 1, c. 3—12 <i>Statutes</i> 562. (Statute of Monopolies, 1623)—		7 Geo. 3, c. 42. (Highways, 1766) . . .	585
s. 12 . . .	781	13 Geo. 3, c. 78—8 <i>Statutes</i> 239. (Highways Act, 1773) . . .	585
12 Car. 2, c. 25. (Wine, 1660) . . .	781	21 Geo. 3, c. 49—4 <i>Statutes</i> 379. (Sunday Observance Act, 1780) . . .	415
13 & 14 Car. 2, c. 6. (Highways, 1662) . . .	584	32 Geo. 3, c. 53. (Metropolitan Justices Act, 1792) . . .	271
13 & 14 Car. 2, c. 12—14 <i>Statutes</i> 481. (Poor Relief Act, 1662) . . .	641, 687, 688	32 Geo. 3, c. 59. (Licensing of Alehouses, 1792) . . .	781
		35 Geo. 3, c. 101. (Poor Removal Act, 1795) . . .	689
		43 Geo. 3, c. 59—9 <i>Statutes</i> 255. (Bridges Act, 1803) . . .	611, 612

	PAGE		PAGE
57 Geo. 3, c. xxix—11 Statutes		6 & 7 Will. 4, c. 86—15	
838. (Metropolitan Paving		Statutes 700. (Births and	
Act, 1817)	256	Deaths Registration Act,	
59 Geo. 3, c. 12—14 Statutes		1836)	32
497. (Poor Relief Act, 1819)	668,	1 & 2 Vict., c. 80—12 Statutes	
9 Geo. 4, c. 61. (Alehouse		766. (Special Constables	
Act, 1828)	783	Act, 1838)	645
10 Geo. 4, c. 44—12 Statutes		2 & 3 Vict., c. 47. (Metro-	
743. (Metropolitan Police		politan Police Act, 1839)	271
Act, 1829)	271, 655, 656	2 & 3 Vict., c. 93—12 Statutes	
11 Geo. 4 & 1 Will. 4, c. 64—		775. (County Police Act,	
9 Statutes 911. (Beerhouse		1839)	646, 647, 653
Act, 1830)	781	s. 6	409
1 & 2 Will. 4, c. 41—12 Stat-		s. 9	659
utes 759. (Special Con-		s. 10	658
stables Act, 1831)	645, 646, 651	2 & 3 Vict., c. xciv. (City of	
1 & 2 Will. 4, c. 60—6 Statutes		London Police Act, 1839)	272,
109. (Vestries Act, 1831)	257		644, 657
2 & 3 Will. 4, c. 45—7 Stat-		3 & 4 Vict., c. 88—12 Statutes	
utes 379. (Representation		787. (County Police Act,	
of the People Act, 1832 (Re-		1840)	646, 647, 648
form Act))	27, 28, 339,	4 & 5 Vict., c. 38—7 Statutes	
	483, 644	274. (School Sites Act,	
2 & 3 Will. 4, c. 71—5 Statutes		1841)	696
823. (Prescription Act, 1832)	577	5 & 6 Vict., c. 109—12 Statutes	
3 & 4 Will. 4, c. 90—8 Statutes		797. (Parish Constables	
1186. (Lighting and Watch-		Act, 1842)	644
ing Act, 1833)	48, 168, 606, 663,	6 & 7 Vict., c. 68—19 Statutes	
	756, 757	335. (Theatres Act, 1843)—	
4 & 5 Will. 4, c. 76—12 Stat-		ss. 3, 5, 12	779
utes 922. (Poor Law		7 & 8 Vict., c. 101—2 Stat-	
Amendment Act, 1834)	28, 30,	utes 9; 14 Statutes 509.	
	38, 59, 199, 257, 339, 340,	(Poor Law Amendment Act,	
	346, 484, 487, 666, 668, 670	1844)	205
s. 1	672	ss. 35, 36	386
s. 38	673	8 & 9 Vict., c. 16—2 Statutes	
s. 52	682	648. (Companies Clauses	
5 & 6 Will. 4, c. 43—12 Stat-		Consolidation Act, 1845)	311
utes 765. (Special Con-		8 & 9 Vict., c. 18—2 Statutes	
stables Act, 1835)	645	1113. (Lands Clauses Con-	
5 & 6 Will. 4, c. 50—9 Stat-		solidation Act, 1845)	311
utes 50. (Highway Act,		8 & 9 Vict., c. 20—14 Statutes	
1835)	579, 585, 586, 587,	30. (Railways Clauses Con-	
	588, 589, 596	solidation Act, 1845)	616
s. 5	613	9 & 10 Vict., c. 74—13 Stat-	
ss. 6, 8, 9, 11, 13, 14, 17, 18	587	utes 519. (Baths and Wash-	
s. 23	595, 596	houses Act, 1846)	48, 197, 510
s. 27	587	9 & 10 Vict., c. 93—12 Stat-	
s. 62	582	utes 335. (Fatal Accidents	
ss. 84—91	580	Act, 1846)	460
5 & 6 Will. 4, c. 76. (Muni-		9 & 10 Vict., c. 96. (Nuisances	
cipal Corporations Act,		Removal Act, 1846)	488
1835)	28, 31, 58, 59, 89, 200, 208,	10 & 11 Vict., c. 14—11 Stat-	
	237, 245, 249, 255, 289,	utes 452. (Markets and Fairs	
	290, 339, 340, 467, 483,	Clauses Act, 1847)	311, 743,
	485, 648, 649, 653		746

	PAGE		PAGE
10 & 11 Vict., c. 15—8 <i>Statutes</i> 1215. (Gasworks Clauses Act, 1847)	311, 743, 758, 765	19 & 20 Vict., c. 2—12 <i>Statutes</i> 810. (Metropolitan Police Act, 1856)	271
s. 21	624	19 & 20 Vict., c. 69—12 <i>Statutes</i> 812. (County and Borough Police Act, 1856)	647, 648, 652, 654
10 & 11 Vict., c. 16—13 <i>Statutes</i> 421. (Commissioners Clauses Act, 1847)	311	s. 5	648
10 & 11 Vict., c. 17—20 <i>Statutes</i> 186. (Waterworks Clauses Act, 1847)	311, 624, 743, 751, 754	s. 9	659
10 & 11 Vict., c. 27—18 <i>Statutes</i> 48. (Harbours, Docks and Piers Clauses Act, 1847)	311	ss. 14, 15	350
10 & 11 Vict., c. 34—13 <i>Statutes</i> 531. (Towns Improvement Clauses Act, 1847)	311	s. 16 . 173, 179, 351, 647, 652	648
ss. 64, 65	607	s. 20	648
10 & 11 Vict., c. 65—2 <i>Statutes</i> 255. (Cemeteries Clauses Act, 1847)	311	21 & 22 Vict., c. 98. (Local Government Act, 1858)	40, 487, 488, 588
10 & 11 Vict., c. 89—12 <i>Statutes</i> 804; 19 <i>Statutes</i> 35. (Town Police Clauses Act, 1847)	311, 663	ss. 4, 6	588
ss. 37, 46	775	22 & 23 Vict., c. 32—12 <i>Statutes</i> 820. (County and Borough Police Act, 1859)—	
10 & 11 Vict., c. 109. (Poor Law Board Act, 1847)	39, 670	ss. 24, 26	650, 652
11 & 12 Vict., c. 43—11 <i>Statutes</i> 270. (Summary Jurisdiction Act, 1848)—		23 & 24 Vict., c. 30—12 <i>Statutes</i> 371. (Public Improvements Act, 1860)	48
s. 31	244, 251	23 & 24 Vict., c. 51—16 <i>Statutes</i> 184. (Local Taxation Returns Act, 1860)	212
11 & 12 Vict., c. 63. (Public Health Act, 1848)	39, 257, 486, 487, 488, 494	24 & 25 Vict., c. 109. (Salmon Fishery Act, 1861)	618
s. 117	588	24 & 25 Vict., c. 124—12 <i>Statutes</i> 825. (Metropolitan Police (Receiver) Act, 1861)	656
11 & 12 Vict., c. 91—12 <i>Statutes</i> 808. (Poor Law Audit Act, 1848)	205	24 & 25 Vict., c. 133—17 <i>Statutes</i> 1045. (Land Drainage Act, 1861)	626, 627
11 & 12 Vict., c. 112. (Metropolitan Sewers Act, 1848)	257	s. 38	627
12 & 13 Vict., c. 85. (Sewers Act, 1849)	626	25 & 26 Vict., c. 61—9 <i>Statutes</i> 122. (Highway Act, 1862)	488
14 & 15 Vict., c. 34. (Labouring Classes Lodging-houses Act, 1851)	517	ss. 17, 18	588
15 & 16 Vict., c. 85—2 <i>Statutes</i> 190. (Burial Act, 1852)	48	s. 35	582
17 & 18 Vict., c. 125—10 <i>Statutes</i> 70; 13 <i>Statutes</i> 175. (Common Law Procedure Act, 1854)	392	s. 44	580
18 & 19 Vict., c. 120—11 <i>Statutes</i> 889. (Metropolis Management Act, 1855)	258	26 Vict., c. 17. (Local Government Act Amendment Act, 1863)	488, 588
		26 & 27 Vict., c. 93—20 <i>Statutes</i> 220. (Waterworks Clauses Act, 1863)	743, 751, 754
		26 & 27 Vict., c. 97—11 <i>Statutes</i> 309. (Stipendiary Magistrates Act, 1863)	252
		26 & 27 Vict., c. 101. (Highway Act, 1864)—	
		s. 24	582
		29 & 30 Vict., c. 41. (Nuisances Removal Act, 1866)	488
		30 Vict., c. 6. (Metropolitan Poor Act, 1867)	265

	PAGE		PAGE
31 & 32 Vict., c. 122—10 <i>Statutes</i> 558; 14 <i>Statutes</i> 544. (Poor Law Amendment Act, 1868)	200	36 & 37 Vict., c. 37—11 <i>Statutes</i> 478. (Fairs Act, 1873)	746
31 & 32 Vict., c. 125—7 <i>Statutes</i> 408. (Parliamentary Elections Act, 1868)	116	36 & 37 Vict., c. 89—8 <i>Statutes</i> 1275. (Gas and Water Works Facilities Act, 1870, Amendment Act, 1873)	311, 312, 751
32 & 33 Vict., c. 27. (Wine and Beerhouse Act, 1869)	781	37 & 38 Vict., c. 58. (Police (Expenses) Act, 1874)	173, 179, 653
32 & 33 Vict., c. 56—7 <i>Statutes</i> 241. (Endowed School Acts, 1869)	456	37 & 38 Vict., c. 89—11 <i>Statutes</i> 1006. (Sanitary Law Amendment Act, 1874)	489
32 & 33 Vict., c. 67—14 <i>Statutes</i> 552. (Valuation (Metropolis) Act, 1869)	264	38 & 39 Vict., c. 55—13 <i>Statutes</i> 623. (Public Health Act, 1875)	31, 33, 49, 156, 168, 176, 216, 217, 219, 229, 292, 297, 355, 445, 454, 489, 490, 491, 495, 496, 504, 505, 515, 570, 675, 743, 756, 757, 758
33 & 34 Vict., c. 70—8 <i>Statutes</i> 1254. (Gas and Water Works Facilities Act, 1870)	311, 312, 751, 757	s. 4	503, 597
33 & 34 Vict., c. 73—9 <i>Statutes</i> 281. (Annual Turnpike Acts Continuation Act, 1870)	611	s. 5	489
33 & 34 Vict., c. 75—7 <i>Statutes</i> 120. (Elementary Education Act, 1870)	695, 697, 701, 702, 714, 730	s. 6	489, 588
ss. 7, 14	698	ss. 7-12	489
s. 35	730	s. 13	489, 503
s. 74	701, 715	s. 14	489
s. 97	698	s. 15	489, 503
33 & 34 Vict., c. 78—20 <i>Statutes</i> 9. (Tramways Act, 1870)	312, 759, 760	ss. 16-19	489
ss. 4, 9, 10, 19	760	ss. 23, 25	504
s. 20	762	s. 26	572
ss. 26, 27	760	s. 27	546
ss. 28, 43	761	s. 39	510
34 Vict., c. 12—11 <i>Statutes</i> 470. (Fairs Act, 1871)	746	s. 41	503
34 & 35 Vict., c. 41—8 <i>Statutes</i> 1263. (Gasworks Clauses Act, 1871)	743, 758, 765	s. 69	624
s. 11	758	s. 80	215
34 & 35 Vict., c. 70—3 <i>Statutes</i> 390. (Local Government Board Act, 1871)	40, 670	s. 131	512
35 & 36 Vict., c. 79. (Public Health Act, 1872)	31, 49, 489	s. 144	580, 588
35 & 36 Vict., c. 91—10 <i>Statutes</i> 559. (Borough Funds Act, 1872)	298	s. 146	596
s. 10	298	s. 147	616
35 & 36 Vict., c. 92—12 <i>Statutes</i> 831. (Parish Constables Act, 1872)	645	s. 148	582
		s. 149	573, 574
		s. 150	423, 579, 598, 601
		s. 151	579, 598
		s. 152	579, 598, 599
		s. 154	596, 601
		ss. 155-156	603
		s. 157	215, 499, 554, 601
		ss. 158, 159	499
		s. 160	311, 607
		s. 161	606, 757
		s. 162	757
		s. 163	756, 757
		s. 164	514
		s. 166	747
		s. 171	311, 663, 775

Table of Statutes

xix

	PAGE		PAGE
38 & 39 Vict., c. 55—13 <i>Statutes</i> 623. (Public Health Act, 1875)— <i>cont.</i>		42 & 43 Vict., c. 54—10 <i>Statutes</i> 575. (Poor Law Act, 1879)	31
s. 174	453	ss. 4-7	72
s. 176	230	45 & 46 Vict., c. 50—10 <i>Statutes</i> 576. (Municipal Corporations Act, 1882)	31, 34, 42, 49, 52, 58, 59, 67, 106, 114, 127, 216, 217, 236, 245, 255, 263, 289, 297, 614, 649
ss. 182-187	215	s. 6	60
ss. 189-191	353	s. 12	101, 122
ss. 207, 229	196	s. 14	61
s. 233	191	s. 18	127
s. 234	191, 193	s. 22	101, 136, 138
ss. 245, 246	201	s. 23	215
s. 247	201, 205, 386	s. 25	127, 201
s. 268	423, 424, 598	ss. 26, 27	201
ss. 270-274	72	s. 28	212
s. 276	349, 490	ss. 34, 35	114
s. 299	361, 391	s. 36	107
ss. 300-302	361	s. 39	101, 107
s. 303	314	s. 70	386
s. 308	574	s. 73	388
s. 316	775	s. 81	117
38 & 39 Vict., c. 83—10 <i>Statutes</i> 568. (Local Loans Act, 1875)	193	s. 87	116, 118, 387
39 & 40 Vict., c. 61—10 <i>Statutes</i> 568. (Divided Parishes and Poor Law Amendment Act, 1876)	31	s. 88	116
ss. 1-9	72	ss. 92, 93	117
39 & 40 Vict., c. 75—20 <i>Statutes</i> 316. (Rivers Pollution Prevention Act, 1876)	623, 624	s. 111	517
s. 2	621	s. 119	613
s. 3	624	s. 139	196, 288
ss. 5-7	622	s. 140	68, 196, 249, 288, 289, 290
ss. 10, 11	623	s. 141	196, 198, 288, 386
39 & 40 Vict., c. 79. (Elementary Education Act, 1876)—		s. 142	127, 196, 288
s. 7	697	s. 143	196, 288, 297
s. 23	701	s. 144	290
40 & 41 Vict., c. 66—16 <i>Statutes</i> 386. (Local Taxation Returns Act, 1877)	212	ss. 150, 151	246
41 & 42 Vict., c. 39. (Freshwater Fisheries Act, 1878)	619	s. 153	246, 247
41 & 42 Vict., c. 77—9 <i>Statutes</i> 166. (Highways and Locomotives (Amendment) Act, 1878)	589, 612	s. 154	250, 251
ss. 21, 22	612	ss. 156, 157	250
s. 23	594	s. 158	251
42 Vict., c. 6—10 <i>Statutes</i> 571. (District Auditors Act, 1879)	200, 201	s. 159	250
		s. 160	249, 251
		s. 161	252
		ss. 162, 163	249
		s. 164	250
		s. 165	249
		s. 170	103, 245
		s. 171	250
		s. 188	245
		s. 190	135, 137, 139, 650
		s. 191	409, 650, 658
		s. 192	350, 650, 651, 653
		s. 196	646, 650

	PAGE		PAGE
45 & 46 Vict., c. 50—10 Statutes 576. (Municipal Corporations Act, 1882)— <i>cont.</i>		51 & 52 Vict., c. 41—10 Statutes 686. (Local Government Act, 1888)	31, 34, 49, 52, 55, 62, 63, 72, 73, 74, 173, 175, 177, 178, 226, 245, 246, 247, 248, 250, 251, 252, 258, 286, 353, 354, 365, 490, 613, 675
ss. 210, 214	68	s. 2	52
s. 215	649	s. 3	52, 243, 612, 619
s. 221	250	s. 5	57, 243
5th Schd.	68, 249, 288, 289	s. 6	612
45 & 46 Vict., c. 56—7 Statutes 686. (Electric Lighting Act, 1882)	312, 764, 765	s. 7	779
ss. 3, 4, 6	765	s. 9	54, 646, 647, 648
45 & 46 Vict., c. 58—10 Statutes 671. (Divided Parishes and Poor Law Amendment Act, 1882)	31	s. 10	365
ss. 2—7	72	s. 11	573, 580, 590, 612
46 & 47 Vict., c. 18—10 Statutes 673. (Municipal Corporations Act, 1883)	58	s. 14	624
46 & 47 Vict., c. 51—7 Statutes 465. (Corrupt and Illegal Practices Prevention Act, 1883), s. 6	118	s. 15	298
47 Vict., c. 11. (Freshwater Fisheries Act, 1884)	619	s. 16	215
47 & 48 Vict., c. 70—7 Statutes 511. (Municipal Elections (Corrupt and Illegal Practices) Act, 1884)	114	s. 20	174, 774
s. 2	118	ss. 21—23	174
s. 3	117, 118	s. 24	174, 179, 353, 653
s. 7	118	ss. 25—27	174
s. 8	116, 117, 118	s. 28	140, 243, 779
s. 18	116, 117	s. 30	54, 136, 139, 144, 244
s. 25	116	s. 31	62, 247
ss. 28, 36	117	s. 32	174, 247
48 & 49 Vict., c. 21—2 Statutes 247. (Burial Boards (Contested Elections) Act, 1885)	48	s. 33	174
50 Vict., Sess. 2, c. 9—7 Statutes 540. (Police Disabilities Removal Act, 1887)—		s. 34	62, 174, 590, 779
s. 2	659	s. 35	244, 245, 248
50 & 51 Vict., c. 19—12 Statutes 41. (Quarry (Fencing) Act, 1887)	495	s. 37	249, 250
50 & 51 Vict., c. 72—10 Statutes 686. (Local Authorities (Expenses) Act, 1887)	201	s. 38	245, 252
51 & 52 Vict., c. 12—7 Statutes 702. (Electric Lighting Act, 1888)	765	s. 39	649
		s. 54	63
		s. 60	31, 72
		ss. 66, 67	244
		s. 68	196
		s. 69	191
		s. 71	673
		s. 74	196
		s. 75	52, 106, 107, 114, 122, 136, 212, 386, 387, 388
		s. 78	243
		s. 80	196, 199, 386
		s. 81	143
		s. 82	136, 140
		s. 83	55
		ss. 84, 100	244
		51 & 52 Vict., c. 52—13 Statutes 810. (Public Health (Buildings in Streets) Act, 1888)—	
		s. 3	603

	PAGE		PAGE
51 & 52 Vict., c. 64—10 <i>Statutes</i> 418. (Law of Libel Amendment Act, 1888)— s. 4	130	55 & 56 Vict., c. 57—9 <i>Statutes</i> 193. (Private Street Works Act, 1892) 579, 598, 599, 601 ss. 7, 8	398
52 & 53 Vict., c. 14—19 <i>Statutes</i> 61. (Town Police Clauses Act, 1889)— s. 4	775	56 Vict., c. 10—12 <i>Statutes</i> 855 (Police Act, 1893)— s. 2	663
52 & 53 Vict., c. 40—7 <i>Statutes</i> 265. (Welsh Intermediate Education Act, 1889)	456	56 Vict., c. 11—13 <i>Statutes</i> 861. (Public Libraries (Amendment) Act, 1893) 732, 736	
52 & 53 Vict., c. 63—18 <i>Statutes</i> 992. (Interpretation Act, 1889)— s. 15	58	56 & 57 Vict., c. 31—20 <i>Statutes</i> 345. (Rivers Pollution Prevention Act, 1893)	623
53 Vict., c. 3—10 <i>Statutes</i> 772. (County Councils Association Expenses Act, 1890)	239	s. 1	624
53 & 54 Vict., c. 59—13 <i>Statutes</i> 824. (Public Health Acts Amendment Act, 1890) 295, 490, 491 s. 13	217	56 & 57 Vict., c. 42. (Elementary Education (Blind and Deaf Children) Act, 1893)— ss. 1, 2, 11	715
s. 19	504	56 & 57 Vict., c. 61—13 <i>Statutes</i> 455. (Public Authorities Protection Act, 1893) 455, 458, 459, 460, 461 s. 1	456, 459
s. 23	499	56 & 57 Vict., c. 66—18 <i>Statutes</i> 1016. (Rules Publication Act, 1893) 335, 337, 646	
s. 41	599	56 & 57 Vict., c. 68—13 <i>Statutes</i> 862. (Isolation Hospitals Act, 1893)	147, 512
53 & 54 Vict., c. 70. (Housing of the Working Classes Act, 1890)	434, 471, 517, 518, 521, 535	56 & 57 Vict., c. 73—10 <i>Statutes</i> 773. (Local Government Act, 1894) 32, 44, 49, 72, 286, 732, 733 s. 1	31, 44
s. 21	527	s. 5	349
54 & 55 Vict., c. 22—13 <i>Statutes</i> 846. (Museums and Gymnasiums Act, 1891)	736	s. 6	44, 48, 349, 645
54 & 55 Vict., c. 63—9 <i>Statutes</i> 191. (Highways and Bridges Act, 1891)	612	s. 7	48, 295, 733, 756
54 & 55 Vict., c. 76—11 <i>Statutes</i> 1025. (Public Health (London) Act, 1891) 262, 263 s. 94	222	s. 8	48, 238, 349, 593
55 & 56 Vict., c. 38—12 <i>Statutes</i> 855. (Police Returns Act, 1892)— s. 1	350	s. 9	428
55 & 56 Vict., c. 53—13 <i>Statutes</i> 850. (Public Libraries Act, 1892) 48, 731, 732, 733 s. 1	732	s. 10	48
s. 2	732, 734, 735	s. 11	196
ss. 3, 4	732	s. 12	191
ss. 11—14	735	s. 13	48, 580, 593
s. 15	734, 735	s. 14	48
ss. 16, 17	735	s. 16	48, 366
		s. 19	44, 196, 349, 580, 593
		s. 20	106
		s. 21	49, 588
		ss. 23, 24	106
		s. 25	580, 588, 595
		s. 26	593
		s. 27	746
		s. 29	196
		s. 36	31, 43
		s. 46	101, 107, 122
		s. 48	106, 114, 387

	PAGE		PAGE
56 & 57 Vict., c. 73—10 <i>Statutes</i> 773. (Local Government Act, 1894)— <i>cont.</i>		63 & 64 Vict., c. 53. (Elementary Education Act, 1900)	701
s. 56	136, 138, 140	s. 6	715
s. 57	143	1 Edw. 7, c. 8—13 <i>Statutes</i> 888. (Isolation Hospitals Act, 1901)	147, 512
s. 63	366	1 Edw. 7, c. 19—13 <i>Statutes</i> 890. (Public Libraries Act, 1901)	735
s. 64	52, 142	2 Edw. 7, c. 17—11 <i>Statutes</i> 729. (Midwives Act, 1902)—	514
57 & 58 Vict., c. 30—8 <i>Statutes</i> 120. (Finance Act, 1894)		s. 8	272
s. 19	175	2 Edw. 7, c. 41—20 <i>Statutes</i> 254. (Metropolis Water Act, 1902)	705, 708, 711, 713, 717, 725, 727
57 & 58 Vict., c. 53. (London (Equalisation of Rates) Act, 1894)	265, 266	s. 1	705
57 & 58 Vict., c. 57—1 <i>Statutes</i> 389. (Diseases of Animals Act, 1894)	322, 336, 624	s. 2	725
59 & 60 Vict., c. 16. (Agricultural Rates Act, 1896)	170, 172	s. 5	704
59 & 60 Vict., c. 48—14 <i>Statutes</i> 252. (Light Railways Act, 1896)	763	s. 6	709
61 & 62 Vict., c. 29—19 <i>Statutes</i> 867. (Locomotives Act, 1898)—		s. 7	424, 425, 713
s. 12	594	s. 10	728
61 & 62 Vict., c. 53—13 <i>Statutes</i> 878. (Libraries Offences Act, 1898)	735, 736	s. 11	709
61 & 62 Vict., c. 57—7 <i>Statutes</i> 292. (Elementary School Teachers (Superannuation) Act, 1898)	731	s. 17	706
62 & 63 Vict., c. 14—11 <i>Statutes</i> 1225. (London Government Act, 1899)	258, 263	s. 18	728
s. 2	264	3 Edw. 7, c. 9—10 <i>Statutes</i> 835. (County Councils (Bills in Parliament) Act, 1903)	298
s. 6	262	3 Edw. 7, c. 14—10 <i>Statutes</i> 836. (Borough Funds Act, 1903)	298
s. 11	265	3 Edw. 7, c. 15—10 <i>Statutes</i> 841. (Local Government (Transfer of Powers) Act, 1903)	365
62 & 63 Vict., c. 19—7 <i>Statutes</i> 705. (Electric Lighting (Clauses) Act, 1899)	312, 743	3 Edw. 7, c. 39. (Housing of the Working Classes Act, 1903)	434, 518
Schd.	766	3 Edw. 7, c. 45. (Employment of Children Act, 1903)	721, 722
62 & 63 Vict., c. 30—2 <i>Statutes</i> 607. (Commons Act, 1899)	348	5 Edw. 7, c. 18. (Unemployed Workmen Act, 1905)	473
62 & 63 Vict., c. 32. (Elementary Education (Defective and Epileptic Children) Act, 1899)	715	6 Edw. 7, c. 25—12 <i>Statutes</i> 382. (Open Spaces Act, 1906)	514
62 & 63 Vict., c. 44—13 <i>Statutes</i> 881. (Small Dwellings Acquisition Act, 1899)—		6 Edw. 7, c. 47—19 <i>Statutes</i> 686. (Trade Disputes Act, 1906)	430
ss. 1, 2, 8, 9	541	6 Edw. 7, c. 57. (Education (Provision of Meals) Act, 1906)	717, 718
62 & 63 Vict., c. cclxix. (Derwent Valley Water Act, 1899)	477	s. 3	717
		s. 4	718

Table of Statutes

xxiii

	PAGE		PAGE
7 Edw. 7, c. 40—15 <i>Statutes</i>		ss. 2, 5	395, 779
765. (Notification of Births		s. 6	779
Act, 1907)	512, 513	9 Edw. 7, c. 34—7 <i>Statutes</i>	
7 Edw. 7, c. 43—7 <i>Statutes</i>		744. (Electric Lighting	
126. (Education (Adminis-		Act, 1909)	767
trative Provisions) Act, 1907)	719,	9 Edw. 7, c. 44—10 <i>Statutes</i>	
	723	846. (Housing, Town Plan-	
s. 11	723	ning, etc. Act, 1909)	434, 472,
s. 13	718		518, 545, 546
7 Edw. 7, c. 53—13 <i>Statutes</i>		s. 17	415, 425
911. (Public Health Acts		s. 18	417
Amendment Act, 1907)	295, 490,	s. 54	546
	491, 663	9 Edw. 7, c. 47—9 <i>Statutes</i>	
s. 17	602	207. (Development and	
s. 18	574	Road Improvement Funds	
s. 19	601	Act, 1909)—	
s. 21	607, 608	s. 8	180
s. 23	499, 500	ss. 9, 10	579, 596
s. 24	499	10 Edw. 7, c. 8—16 <i>Statutes</i>	
s. 47	510	747. (Finance (1909—10)	
s. 76	514	Act, 1910)—	
s. 90	663	s. 88	175, 179
7 Edw. 7, c. cxi—14 <i>Statutes</i>		10 Edw. 7 & 1 Geo. 5, c. 19—	
599. (City of London		10 <i>Statutes</i> 848. (Muni-	
(Union of Parishes) Act,		cipal Corporations Amend-	
1907)	265, 657	ment Act, 1910)	61
8 Edw. 7, c. 6—13 <i>Statutes</i>	948.	10 Edw. 7 & 1 Geo. 5, c. 24—	
(Public Health Act, 1908)	743	9 <i>Statutes</i> 985. (Licensing	
s. 1	747, 748	(Consolidation) Act, 1910)	783
8 Edw. 7, c. 15—4 <i>Statutes</i>		s. 1	783
739. (Costs in Criminal		s. 2	784, 785, 786, 789
Cases Act, 1908)—		s. 3	785
ss. 1—4	244, 247	s. 4	786
8 Edw. 7, c. 16—16 <i>Statutes</i>		s. 6	786, 789
738. (Finance Act, 1908)—		ss. 9, 10	785
s. 6	175	s. 12	785, 786
8 Edw. 7, c. 36—1 <i>Statutes</i>		s. 13	787
257. (Small Holdings and		s. 14	785, 786, 787
Allotments Act, 1908)	48	s. 15	785
8 Edw. 7, c. 43—10 <i>Statutes</i>		s. 16	787
844. (Local Authorities		s. 17	788
(Admission of the Press to		s. 18	788, 789
Meetings) Act, 1908)	129	ss. 19—21	789
8 Edw. 7, c. 68—20 <i>Statutes</i>		ss. 22, 23	790
350. (Port of London Act,		s. 24	790, 791
1908)	273	ss. 25—27	791
9 Edw. 7, c. 7—20 <i>Statutes</i>		s. 29	787, 788, 791
650. (Labour Exchanges		s. 33	787, 791
Act, 1909)	474	ss. 34—40	793
9 Edw. 7, c. 13. (Local Educa-		s. 41	785
tion Authorities (Medical		ss. 55, 57	793
Treatment) Act, 1909)	719	ss. 58—60	784
9 Edw. 7, c. 30—19 <i>Statutes</i>		s. 64	791
352. (Cinematograph Act,		ss. 70—72	793
1909)	779	ss. 87, 88	791
		ss. 91, 92	784

	PAGE		PAGE
10 Edw. 7 & 1 Geo. 5, c. 24— 9 Statutes 985. (Licensing (Consolidation) Act, 1910)— <i>cont.</i>		8 & 9 Geo. 5, c. 64. (Repre- sentation of the People Act, 1918)—	
s. 110	783	s. 8	94
s. 111	784	s. 11	94, 95
1st Schd. Pts. I, II	788	ss. 12-14, 42	94
2nd Schd. Pts. I, II	788	1st Schd.	94
3rd Schd. Pts. I, II	789	6th Schd.	94
4th Schd.	790	para. 2	60
1 Geo. 5, c. 2—16 Statutes 763. (Revenue Act, 1911)—		9 & 10 Geo. 5, c. 21—3 Stat- utes 416. (Ministry of Health Act, 1919)	40
s. 18	175, 179	9 & 10 Geo. 5, c. 35—13 Stat- utes 956. (Housing, Town Planning, etc. Act, 1919)	415, 472, 518, 535, 546
1 & 2 Geo. 5, c. 7—7 Statutes 546. (Municipal Elections (Corrupt and Illegal Practices) Act, 1911)	114	s. 7	180
1 & 2 Geo. 5, c. 13—12 Stat- utes 512. (Parliament Act, 1911)	293	s. 9	527
2 Geo. 5, c. 4. (Metropolitan Police Act, 1912)—		1st Schd.	527
s. 1	656	9 & 10 Geo. 5, c. 46—12 Statutes 867. (Police Act, 1919)	660
3 & 4 Geo. 5, c. 28—11 Stat- utes 160. (Mental De- ficiency Act, 1913)	717	s. 4	348, 653
3 & 4 Geo. 5, c. 64. (Local Government (Adjustments) Act, 1913)	85	s. 7	656
4 & 5 Geo. 5, c. 61—12 Stat- utes 862. (Special Con- stables Act, 1914)	646	s. 8	179
5 & 6 Geo. 5, c. 64—15 Statutes 767. (Notification of Births (Extension) Act, 1915)	513	9 & 10 Geo. 5, c. 50—3 Stat- utes 422. (Ministry of Trans- port Act, 1919)	760
8 & 9 Geo. 5, c. 17—17 Stat- utes 1078. (Land Drainage Act, 1918)	628, 629, 630	s. 2	590
ss. 4-6, 8	630	s. 17	180, 574, 591, 604
8 & 9 Geo. 5, c. 29—11 Stat- utes 742. (Maternity and Child Welfare Act, 1918)	513	s. 26	373
8 & 9 Geo. 5, c. 39. (Education Act, 1918)	705, 723, 724	9 & 10 Geo. 5, c. 93—13 Stat- utes 966. (Public Libraries Act, 1919)	734
s. 2	723, 724	s. 1	733
ss. 3, 4	724	ss. 2, 3	734
s. 6	707	s. 4	732, 735
s. 10	724	s. 6	735
s. 17	720	s. 7	732
s. 18	719	s. 8	735
s. 21	720	s. 9	736
s. 24	723	9 & 10 Geo. 5, c. 100—7 Stat- utes 754. (Electricity (Sup- ply) Act, 1919)	767, 768, 769
8 & 9 Geo. 5, c. 55—7 Statutes 303. (School Teachers (Superannuation) Act, 1918)	126, 731	s. 6	146
		s. 7	146, 327
		s. 26	312, 314, 325
		s. 39	146, 764
		10 & 11 Geo. 5, c. 28—8 Stat- utes 1278. (Gas Regulation Act, 1920)—	
		s. 10	757
		10 & 11 Geo. 5, c. 49—20 Stat- utes 593. (Blind Persons Act, 1920)	104

Table of Statutes

XXV

	PAGE		PAGE
10 & 11 Geo. 5, c. 72—19 <i>Statutes</i> 85. (Roads Act, 1920)—		12 & 13 Geo. 5, c. 46—7 <i>Statutes</i> 778. (Electricity (Supply) Act, 1922)	769
s. 1	179, 774	12 & 13 Geo. 5, c. 59—10 <i>Statutes</i> 863. (Local Government and other Officers' Superannuation Act, 1922)	295
s. 2	179	13 & 14 Geo. 5, c. 9—1 <i>Statutes</i> 80. (Agricultural Holdings Act, 1923)	430
s. 3	179, 180	13 & 14 Geo. 5, c. 11—12 <i>Statutes</i> 895. (Special Constables Act, 1923)	646
s. 4	180, 579, 596	13 & 14 Geo. 5, c. 16—8 <i>Statutes</i> 780. (Salmon and Freshwater Fisheries Act, 1923)	619
s. 14	179	ss. 38, 45, 50, 52	620
1st Schd.	180	s. 55	624
2nd Schd.	579, 596	s. 57	620
10 & 11 Geo. 5, c. 80—19 <i>Statutes</i> 192. (Air Navigation Act, 1920)	469, 771	13 & 14 Geo. 5, c. 24—13 <i>Statutes</i> 984. (Housing, etc. Act, 1923)	472, 518, 536, 537
11 & 12 Geo. 5, c. 23—10 <i>Statutes</i> 859. (Public Health (Officers) Act, 1921)	354, 355	s. 1	180
11 & 12 Geo. 5, c. 31—12 <i>Statutes</i> 873. (Police Pensions Act, 1921)	659	13 & 14 Geo. 5, c. 39. (Agricultural Rates Act, 1923)	170, 172
11 & 12 Geo. 5, c. 42—9 <i>Statutes</i> 1055. (Licensing Act, 1921)—		14 & 15 Geo. 5, c. 34—19 <i>Statutes</i> 172. (London Traffic Act, 1924)	273
ss. 1-5	793	14 & 15 Geo. 5, c. 35—13 <i>Statutes</i> 992. (Housing (Financial Provisions) Act, 1924)	472, 518, 536
s. 11	783	ss. 1, 2	180
1st Schd.	793	14 & 15 Geo. 5, c. 38—20 <i>Statutes</i> 470. (National Health Insurance Act, 1924)	7
11 & 12 Geo. 5, c. 51—7 <i>Statutes</i> 130. (Education Act, 1921)	227, 347, 456, 694, 705, 711, 718, 728	15 Geo. 5, c. 14—13 <i>Statutes</i> 1001. (Housing Act, 1925)	329, 331, 396, 434, 472, 607
s. 4	706	ss. 3, 7	434
s. 6	707	s. 14	434
s. 17	708	s. 40	327
ss. 20-22	723	s. 46	527
s. 23	720	s. 115	434
s. 24	723	1st Schd., Pt. I	527
s. 27	698	15 Geo. 5, c. 16—13 <i>Statutes</i> 1079. (Town Planning Act, 1925)	547
s. 28	698, 699	15 Geo. 5, c. 19—20 <i>Statutes</i> 94. (Trustee Act, 1925) s. 61	207
s. 29	424, 708, 713	15 Geo. 5, c. 20—15 <i>Statutes</i> 177. (Law of Property Act, 1925)—	
s. 30	709, 713	s. 74	451
s. 32	709		
s. 46	701		
ss. 52, 54-56	715		
ss. 70-73	735		
ss. 75-78	724		
ss. 80, 81	719		
ss. 82-85	718		
s. 86	720		
s. 118	728		
s. 119	723		
s. 122	728		
s. 148	730		
s. 167	709		
6th Schd. para. (3) (a)	698		
11 & 12 Geo. 5, c. 55—14 <i>Statutes</i> 316. (Railways Act, 1921)—			
s. 68	763		

	PAGE		PAGE
15 Geo. 5, c. 22—15 Statutes		s. 20	154
524. (Land Charges Act, 1925)—		s. 22	156
s. 15	557	s. 25	158
15 & 16 Geo. 5, c. 49—13 Statutes		s. 26	158, 160, 163
209. (Supreme Court of Judicature (Consolidation) Act, 1925)—		ss. 27, 28	160
s. 67	116	ss. 31, 32	161
15 & 16 Geo. 5, c. 68—9 Statutes		s. 37	160, 163
219. (Roads Improvement Act, 1925)—		s. 38	161
s. 4	608	s. 40	158
s. 5	604	s. 57	163
15 & 16 Geo. 5, c. 70—20 Statutes		s. 62	668
596. (Widows', Orphans' and Old Age Contributory Pensions Act, 1925)	683	s. 67	331
15 & 16 Geo. 5, c. 71—13 Statutes		s. 68	43, 154
1115. (Public Health Act, 1925)	295, 490, 491, 603	s. 70	264
ss. 13-15	607	2nd Schd., Pts. I, II	156
ss. 17, 18	608	16 & 17 Geo. 5, c. 9—7 Statutes	
s. 19	376, 608	649; 7 Statutes 229. (Economy (Miscellaneous Provisions) Act, 1926)	728
s. 23	608	s. 9	94
ss. 25-28	572	16 & 17 Geo. 5, c. 11—15 Statutes	
s. 29	602	546. (Law of Property (Amendment) Act, 1926)—	
s. 30	399, 602	Schd.	557
s. 31	602	16 & 17 Geo. 5, c. 20. (Boards of Guardians (Default) Act, 1926)	364
s. 33	603, 604	16 & 17 Geo. 5, c. 22—16 Statutes	
s. 35	601	960. (Finance Act, 1926)—	
(Baths and Washhouses Act, 1925) [Pt. IX (ss. 85-87) of Public Health Act, 1925]	48, 197, 510	s. 42	180
15 & 16 Geo. 5, c. 84—11 Statutes		16 & 17 Geo. 5, c. 24—17 Statutes	
513. (Workmen's Compensation Act, 1925)	430	1090. (Land Drainage Act, 1926)	630
15 & 16 Geo. 5, c. 90—14 Statutes		16 & 17 Geo. 5, c. 38—10 Statutes	
617. (Rating and Valuation Act, 1925)	43, 44, 51, 153, 156, 161, 163, 166, 167, 246, 728	878. (Local Government (County Boroughs and Adjustments) Act, 1926)	63, 73, 74, 85, 308, 309
s. 1	153	16 & 17 Geo. 5, c. 51—7 Statutes	
s. 2	167, 168	792. (Electricity (Supply) Act, 1926)	764, 769
s. 3	168	ss. 1-4	770
s. 6	166	s. 36	146
s. 7	169	s. 43	152
s. 9	164	5th Schd.	152
s. 11	169	16 & 17 Geo. 5, c. 56—13 Statutes	
ss. 12, 13	166	1162. (Housing (Rural Workers) Act, 1926)	533, 534
s. 16	159, 348	s. 4	534
s. 17	159	16 & 17 Geo. 5, c. 59—3 Statutes	
s. 18	137, 162	59. (Coroners (Amendment) Act, 1926)—	
s. 19	158, 160	s. 2	57, 243, 250

Table of Statutes

xxvii

	PAGE		PAGE
17 & 18 Geo. 5, c. 14—12 Statutes 956. (Poor Law Act, 1927)	364, 670	s. 31	180, 409, 580, 591, 614, 616
s. 2	671	s. 32	409, 580, 592, 614
17 & 18 Geo. 5, c. 19—12 Statutes 898. (Police (Appeals) Act, 1927)	409, 659	s. 33	409, 592, 614
17 & 18 Geo. 5, c. 31—10 Statutes 879. (Audit (Local Authorities) Act, 1927)	201, 205, 208	s. 34	409, 580, 592, 614
s. 2	386	s. 35	52, 409, 592, 614
18 & 19 Geo. 5, c. 9—11 Statutes 1398. (Local Authorities (Emergency Provisions) Act, 1928)	265	s. 36	409, 592
18 & 19 Geo. 5, c. 12—7 Statutes 651. (Representation of the People (Equal Franchise) Act, 1928)—		s. 37	409
s. 2	95	s. 38	595
18 & 19 Geo. 5, c. 31—8 Statutes 884. (Food and Drugs (Adulteration) Act, 1928)	496	s. 40	547
s. 15	356	s. 51	350
18 & 19 Geo. 5, c. 44—14 Statutes 713. (Rating and Valuation (Apportionment) Act, 1928)	157, 172	s. 55	298
s. 7	265	s. 57	361
19 Geo. 5, c. 17—10 Statutes 883. (Local Government Act, 1929)	31, 32, 36, 40, 49, 51, 63, 67, 72, 74, 102, 104, 153, 174, 177, 178, 186, 187, 189, 265, 266, 268, 319, 342, 351, 354, 355, 356, 367, 591, 592, 614, 666, 671, 672, 674, 675, 683, 686	s. 58	51
s. 1	671	s. 63	512
s. 3	673	ss. 67, 68	157, 172
s. 4	674	s. 74	193
s. 5	104, 674	s. 85	178, 179, 655
s. 6	674, 676	s. 86	182
ss. 7, 8	674	s. 87	179, 182
s. 10	104	s. 88	184, 188, 267
s. 14	512	s. 89	187
s. 15	159	s. 90	188
s. 17	201	s. 91	187
s. 18	265, 266	ss. 94, 96, 97	188
s. 29	180, 409, 573, 580, 591, 614	s. 98	266, 267
s. 30	180, 409, 580, 591, 593, 598, 614, 616	ss. 99, 100	268
		s. 104	357
		s. 105	178
		s. 108	85, 320
		s. 110	185
		s. 113	672
		s. 115	349
		s. 119	672
		s. 134	188
		s. 135	181, 188
		1st Schd.	580, 598, 616
		2nd Schd.	179, 181, 591, 655
		3rd Schd., para. 3	354
		4th Schd., Pt. III	184
		Pt. IV	187
		7th Schd.	349
		9th Schd., para. 8	266
		12th Schd., 179, 247, 366,	653
		19 & 20 Geo. 5, c. 23—2 Statutes 775. (Companies Act, 1929)—	
		s. 29	450
		19 & 20 Geo. 5, c. 33—9 Statutes 268. (Bridges Act, 1929)	614, 615
		ss. 2, 3, 14	615
		20 Geo. 5, c. 17—12 Statutes 968. (Poor Law Act, 1930)	34, 292, 346, 347, 670, 671, 675, 692

	PAGE		PAGE
20 Geo. 5, c. 17—12 Statutes		s. 63	775
968. (Poor Law Act, 1930)—cont.		s. 64	776
s. 1	341, 342, 347, 672, 678, 679	ss. 67-71	775
s. 2	260, 262, 671	ss. 72, 73	776, 777
s. 3	147, 344, 673	ss. 74, 77, 80	776
s. 4	136, 137, 141, 676	s. 81	776, 777
s. 5	137, 676, 677, 680	s. 82	776
s. 9	344	ss. 101-104	762
ss. 10, 11, 13	345	s. 121	775
s. 14	680	20 & 21 Geo. 5, c. 44—23 Statutes	529. (Land Drainage
s. 15	679, 689	Act, 1930)	37, 477, 629, 631
s. 16	673	s. 1	632, 633
s. 19	680	s. 3	632
s. 20	679	s. 4	633, 634
s. 22	343	ss. 6, 7	633
s. 23	342	ss. 20, 24	634
s. 33	685	s. 56	624
s. 37	345	s. 83	632
s. 41	685	2nd Schd., Pt. III	333
s. 44	686	20 & 21 Geo. 5, c. 50—23 Statutes	769. (Public Works
s. 45	342, 682	Facilities Act, 1930)	234, 235, 315, 316
s. 52	687	1st Schd., Pt. III	333
ss. 84, 85	690	20 & 21 Geo. 5, c. 51—23 Statutes	755. (Reservoirs (Safety
s. 86	690, 691	Provisions) Act, 1930)	751
ss. 87-90	691	21 Geo. 5, c. 6—24 Statutes	173. (Education (Local
s. 93	690	Authorities) Act, 1931)	705
ss. 95, 105	689	21 & 22 Geo. 5, c. 22—24 Statutes	370. (Housing (Rural
ss. 113-116	674	Workers) Amendment Act,	1931)
s. 119	201, 202, 208, 344, 673		534
s. 120	344	21 & 22 Geo. 5, c. 45—24 Statutes	240. Local Govern-
s. 136	342, 343	ment (Clerks) Act, 1931)	55
s. 142	343, 393	ss. 1, 2, 4	56
s. 160	344	22 & 23 Geo. 5, c. 28—25 Statutes	468. (Public Health
s. 163	262	(Cleansing of Shell-fish	Act, 1932)
4th Schd.	671		217, 219, 229
20 & 21 Geo. 5, c. 24—32 Statutes	455. (Railways	22 & 23 Geo. 5, c. 33—25 Statutes	538. (Rating and Valua-
(Valuation for Rating) Act,	1930)		tion (No. 2) Act, 1932)
	155		158
20 & 21 Geo. 5, c. 39—23 Statutes	396. (Housing Act,	22 & 23 Geo. 5, c. 45—25 Statutes	191. (Rights of Way
1930)	434, 472, 518, 527, 528, 537	Act, 1932)	576, 577
s. 11	333	22 & 23 Geo. 5, c. 48—25 Statutes	470. (Town and
s. 22	399, 435		Country Planning Act,
20 & 21 Geo. 5, c. 43—23 Statutes	607. (Road Traffic Act,	1932)	34, 319, 348, 477, 543, 544, 548, 549, 552, 554, 566, 602
1930)	37, 778	s. 1	553
s. 4	774		
s. 5	774		
s. 54	594		
s. 55	607		
s. 57	180		
s. 61	774, 775		
s. 62	774		

Table of Statutes

xxix

	PAGE		PAGE
22 & 23 Geo. 5, c. 48—25 Statutes 470. (Town and Country Planning Act, 1932)— <i>cont.</i>		23 Geo. 5, c. 14—26 Statutes 744. (London Passenger Transport Act, 1933)	272
s. 2	142	s. 58	273
s. 3	144, 408, 552	12th Schd.	273
s. 4	144, 552	23 & 24 Geo. 5, c. 15—26 Statutes 646. (Housing (Financial Provisions) Act, 1933)	180, 530, 533, 536
ss. 6, 7	556	23 & 24 Geo. 5, c. 28—26 Statutes 290. (Municipal Corporations (Audit) Act, 1933)	200, 201, 210
s. 8	325, 326, 562	23 & 24 Geo. 5, c. 29—26 Statutes 130. (Education (Necessity of Schools) Act, 1933)	227
s. 10	558, 560	23 & 24 Geo. 5, c. 33—26 Statutes 631. (Metropolitan Police Act, 1933)	272, 656
s. 11	146, 553, 563, 579	23 & 24 Geo. 5, c. 36—26 Statutes 80. (Administration of Justice (Miscellaneous Provisions) Act, 1933)	15
s. 12	398, 399, 553, 554, 564	23 & 24 Geo. 5, c. 51—26 Statutes 295. (Local Government Act, 1933)	43, 44, 49, 52, 55, 58, 59, 62, 63, 71, 72, 73, 92, 93, 100, 101, 104, 105, 106, 107, 110, 122, 136, 143, 191, 196, 200, 201, 216, 217, 219, 225, 226, 227, 230, 231, 234, 235, 236, 238, 254, 255, 258, 263, 289, 290, 298, 299, 312, 354, 728
s. 13	556, 563, 564	s. 1	35, 42, 43, 50, 62
ss. 15, 16	563	s. 2	53, 282, 286
ss. 18—20	555, 557	s. 3	53, 88, 103
ss. 21—23	555	s. 4	53
s. 24	548, 555	s. 6	53, 89, 108, 113
s. 25	564	s. 7	53, 113
s. 32	549	s. 8	53, 88, 90, 109
s. 35	565	s. 10	79, 97
s. 36	363, 565	s. 11	79, 80, 97
s. 37	320, 561	s. 14	109
s. 47	398, 564	s. 17	60, 282, 287
s. 51	549	s. 18	61, 88, 103, 250, 251
s. 53	557	s. 21	61, 89, 108, 113
s. 55	549	s. 22	61, 113, 245
1st Schd., Pt. I	333	s. 23	60, 88, 90, 109
para. 2	325, 562	s. 24	60, 81, 97
para. 3	326, 562	s. 25	60, 82, 97
Pt. II	333, 562	s. 28	109
para. 6	327	ss. 31, 32	50, 282, 286
2nd Schd.	553, 579	s. 33	50, 88
3rd Schd., Pt. II, para. 4	562	s. 35	50, 88, 90, 109
4th Schd.	320		
22 & 23 Geo. 5, c. 51—25 Statutes 921. (Sunday Entertainments Act, 1932)	415		
22 & 23 Geo. 5, c. 52—25 Statutes 935. (National Health Insurance and Contributory Pensions Act, 1932)	683		
23 Geo. 5, c. 2—25 Statutes 861. (Expiring Laws Continuance Act, 1932)	315		
23 Geo. 5, c. 8—26 Statutes 289. (Local Government (General Exchequer Contributions) Act, 1933)	182		
23 Geo. 5, c. 12—26 Statutes 168. (Children and Young Persons Act, 1933)	721		
ss. 18—20	722		
s. 96	513		

	PAGE		PAGE
23 & 24 Geo. 5, c. 51—26 Statutes 295. (Local Government Act, 1933)— <i>cont.</i>		s. 106	61, 123, 124, 125
s. 36	97	s. 107	51, 123, 124, 125
ss. 37, 38	82, 97	s. 108 . . . . .	. . . . . 125, 356
s. 40	106, 114	s. 109	125, 354, 356
s. 42	87	s. 110 . . . . .	. . . . . 125, 356
s. 43	44, 45, 83	s. 111 . . . . .	. . . . . 51, 141
ss. 44, 45	45, 83	s. 112 . . . . .	. . . . . 312
s. 46	84	s. 113 . . . . .	. . . . . 356
s. 47	44, 47, 87, 282, 283, 452	s. 114 . . . . .	. . . . . 48, 123
s. 48	47, 282, 283, 286, 452	ss. 118, 121 . . . . .	. . . . . 125
s. 49	45, 46, 88	s. 122 . . . . .	. . . . . 103, 105
s. 50	46, 88, 90, 100, 109	s. 123 . . . . .	. . . . . 128
s. 51	46, 97, 112, 113	s. 125 . . . . .	. . . . . 227, 229
s. 52	45, 83, 97	s. 127 . . . . .	. . . . . 48, 227
s. 54	106, 114	s. 128 . . . . .	. . . . . 48
s. 55	367	s. 129 . . . . .	. . . . . 60, 68, 69, 71, 282, 287
s. 56	45, 82, 83	s. 130 . . . . .	. . . . . 69
s. 57	100	s. 131 . . . . .	. . . . . 71, 81, 97
s. 59	102, 104, 208	s. 132 . . . . .	. . . . . 70, 84
s. 61	113	s. 133 . . . . .	. . . . . 68, 70
s. 62	107	s. 134 . . . . .	. . . . . 70
s. 63	108	s. 136 . . . . .	. . . . . 649
s. 65	107	s. 137 . . . . .	. . . . . 71
ss. 66-68	108	s. 139 . . . . .	. . . . . 63, 76, 85, 309
s. 71	115, 119, 376, 388	s. 140 . . . . .	. . . . . 74, 78, 309, 312
s. 72	367, 387	s. 141 . . . . .	. . . . . 74, 79, 83
s. 75	165	s. 142 . . . . .	. . . . . 74
s. 76	102, 123, 128, 213, 367, 420	s. 143 . . . . .	. . . . . 74, 78
s. 77	44	ss. 144, 145 . . . . .	. . . . . 74
s. 78	45	s. 146 . . . . .	. . . . . 74, 78
s. 84	119, 120, 376, 388	s. 148 . . . . .	. . . . . 70, 79, 84, 244
s. 85	135, 136, 141	s. 149 . . . . .	. . . . . 70, 79, 84
s. 86	136, 137, 165, 198	s. 150 . . . . .	. . . . . 70, 79, 84, 126
s. 87	143	s. 151 . . . . .	. . . . . 79, 84, 85
s. 88	48, 143, 456	s. 152 . . . . .	. . . . . 79, 85
s. 89	137	s. 153 . . . . .	. . . . . 31, 72, 79
s. 90	135, 137, 138, 141	s. 154 . . . . .	. . . . . 79
s. 91	144, 145	s. 157 . . . . .	. . . . . 227
s. 93	145	s. 158 . . . . .	. . . . . 228
s. 95	102, 123, 213, 420	s. 159 . . . . .	. . . . . 228, 229, 314
s. 96	213	s. 160 . . . . .	. . . . . 231, 312, 314
s. 97	254	s. 161 . . . . .	. . . . . 232, 411
s. 98	55, 56, 124	s. 162 . . . . .	. . . . . 234, 333, 335, 428
s. 99	56, 124	ss. 163-165 . . . . .	. . . . . 238
s. 100	56, 124, 126, 356	s. 167 . . . . .	. . . . . 48, 227, 228
s. 101	124	s. 168 . . . . .	. . . . . 48, 228, 236, 367, 408, 428
s. 102	56, 124, 125	ss. 169, 170 . . . . .	. . . . . 48, 238
s. 103	56, 124, 126, 356	ss. 171, 172 . . . . .	. . . . . 151, 237
s. 104	56, 124, 125	s. 174 . . . . .	. . . . . 233, 234
s. 105	56, 123, 125	s. 179 . . . . .	. . . . . 229, 233, 238
		ss. 180, 181 . . . . .	. . . . . 165, 199
		s. 182 . . . . .	. . . . . 165, 198
		s. 183 . . . . .	. . . . . 164, 165
		s. 184 . . . . .	. . . . . 199, 386, 400

	PAGE		PAGE
23 & 24 Geo. 5, c. 51—26 Statutes 295. (Local Government Act, 1933)— <i>cont.</i>		s. 269	44, 349
s. 185 . . . 197, 237, 288, 289,		s. 270	365
290, 291, 297		s. 271	349
s. 186 . . . 163, 288, 290		s. 272	349, 490
s. 187 . . . 198, 249, 251, 288,		s. 273	366
289, 386, 400		s. 274	51, 142, 456
s. 188	196	s. 275	79
s. 189	163	s. 283	129, 198, 209
s. 190 . . . 167, 168, 197, 493		s. 284	350
s. 191	197	s. 285	231, 313
s. 192	163	ss. 287, 288	203
s. 193 . . . 46, 48, 164,		s. 290	299, 350
197, 511		s. 293	312
s. 194	152	s. 294	239
s. 195 . . . 48, 192, 366		s. 296	45
ss. 196, 197	193	s. 299	326
s. 198 . . . 191, 193, 194		s. 301	59
s. 200	193	s. 305 . . . 48, 50, 142, 167, 237,	295, 349
s. 201	192, 193	s. 308	33
ss. 202-211, 212-214	193	1st Schd., Pt. I	52
s. 215	190	Pt. II	62
s. 217	193	2nd Schd.	106
s. 218 . . . 191, 192		Pt. I, para. 2	110
s. 219 . . . 202, 210, 264, 673		para. 3	114
ss. 220-222	201	para. 5	110
s. 223	202	para. 8	111
ss. 224, 225	203	para. 9	112
s. 226 . . . 203, 204		Pt. II	109
s. 227	205	Pt. III	112
s. 228 . . . 203, 204, 205, 359		3rd Schd.	129
s. 229 . . . 205, 206, 208,		Part I, para. 1	53,
386, 400		128, 213	
s. 230 . . . 205, 207, 208		para. 3	53
s. 231	205	Pt. II, para. 1	61,
ss. 232, 233	207	128, 213	
s. 236	202	para. 3	61
ss. 237, 238	209	Pt. III, para. 1	50,
s. 239	210	128	
s. 240 . . . 209, 211		para. 3	50
s. 241	202	para. 5	350
ss. 244-248	212	Pt. IV, para. 1	128,
s. 249 . . . 217, 218		129	
s. 250 . . . 216, 218, 219		para. 5	112
s. 251 . . . 220, 382		Pt. V, para. 1	129
s. 252	221	para. 4	129,
s. 253	298	213	
s. 254	299	Pt. VI, para. 1	44
s. 255 . . . 299, 300		para. 3	45
s. 258	298	para. 5	46
ss. 259-265	237	para. 7	213
s. 266 . . . 213, 449, 450,		4th Schd.	126
454		6th Schd.	231, 232
s. 267 . . . 239, 674		7th Schd.	227, 230
s. 268 . . . 238, 349		8th Schd.	191, 193

	PAGE		PAGE
23 & 24 Geo. 5, c. 51—26 Statutes 295. (Local Government Act, 1933)— <i>cont.</i>		s. 7	411, 426, 575, 604, 605
9th Schd.	300	s. 8	604
11th Schd.	31, 43, 44, 48, 72, 164, 252, 289, 298, 342, 345, 349, 365, 454, 756	s. 9	575, 605
23 & 24 Geo. 5, c. 53—26 Statutes 870. (Road and Rail Traffic Act, 1933)—		s. 11	606
s. 1	774, 777	ss. 13, 14	605
ss. 2-4, 7, 8, 13, 15	778	s. 19	180, 605
s. 27	774	26 Geo. 5 & 1 Edw. 8, c. 34—	
s. 30	615	29 Statutes 762. (Finance Act, 1936)—	
Schd. I	774	s. 33	180, 182
24 & 25 Geo. 5, c. 28—27 Statutes 302. (Gas Undertakings Act, 1934)—s. 9	742	3rd Schd.	182
24 & 25 Geo. 5, c. 29—27 Statutes 756. (Unemployment Act, 1934)	37, 39, 683	26 Geo. 5 & 1 Edw. 8, c. 40—	
s. 45	183	29 Statutes 264. (Midwives Act, 1936)	189, 357
s. 53	683	s. 1	319, 514
8th Schd.	683	s. 4	183, 189, 357
24 & 25 Geo. 5, c. 50—27 Statutes 534. (Road Traffic Act, 1934)—		1st Schd.	189
s. 1	364	26 Geo. 5 & 1 Edw. 8, c. 41—	
s. 18	364, 607	29 Statutes 117. (Education Act, 1936)	701, 712, 714
s. 23	168, 606, 757	ss. 8-10	713
s. 24	775	ss. 12, 13	699
s. 31	779	3rd Schd.	713
25 Geo. 5, c. 1—27 Statutes 826. (Special Areas (Development and Improvement) Act, 1934)	567	26 Geo. 5 & 1 Edw. 8, c. 43—	
3rd Schd.	333	29 Statutes 923. (Tithe Act, 1936)	168
25 Geo. 5, c. 3—28 Statutes 51. (Electricity (Supply) Act, 1935)	770	s. 25	189
25 & 26 Geo. 5, c. 31—28 Statutes 7. (Diseases of Animals Act, 1935)	322, 336	5th Schd.	189
25 & 26 Geo. 5, c. 40—28 Statutes 199. (Housing Act, 1935)	473, 519, 537, 538, 540	26 Geo. 5 & 1 Edw. 8, c. 44—	
s. 25	531	29 Statutes 815. (Air Navigation Act, 1936)	227, 469, 771
ss. 37-39	534	ss. 9, 12	771
25 & 26 Geo. 5, c. 47—28 Statutes 79. (Restriction of Ribbon Development Act, 1935)	380, 411, 419, 466, 574, 604, 606	26 Geo. 5 & 1 Edw. 8, c. 49—	
s. 1	364, 411, 575, 605	29 Statutes 209. (Public Health Act, 1936)	34, 48, 217, 254, 292, 295, 366, 489, 491, 492, 505, 510, 515, 753, 754
s. 2	411, 575, 605	s. 1	492
		ss. 2-5	146, 493
		s. 6	146, 477, 492
		s. 7	492
		s. 8	146, 493
		ss. 9, 10	146, 492, 493
		s. 11	492
		s. 12	167, 493
		s. 13	349, 492
		ss. 14-18	506
		s. 19	509
		s. 20	505, 506
		s. 21	506
		ss. 22, 23	507
		s. 24	505
		s. 25	502
		ss. 27, 28, 30, 31, 34-36	507
		s. 37	502, 507, 509

Table of Statutes

xxxiii

	PAGE
26 Geo. 5 & 1 Edw. 8, c. 49—	
29 Statutes 309. (Public	
Health Act, 1936)— <i>cont.</i>	
s. 39	505, 507, 508
s. 41	492
s. 43	502, 509
ss. 44, 45	509
s. 46	492
ss. 47, 50, 51	509
s. 52	502, 509
ss. 53-55, 58, 59	502
s. 61	218, 500, 501, 554
s. 62	501
s. 63	224, 502
s. 64	501, 502
s. 65	382, 502
s. 67	502
s. 68	224, 500
s. 69	364, 500
ss. 72-75, 77	509
s. 78	510
ss. 79, 80	492
s. 83	509
s. 84	510
ss. 85, 86	492, 510
s. 87	492
ss. 88, 89	510
s. 90	501, 506, 507
ss. 91, 92	482, 494, 495
s. 93	482, 494
ss. 94-96	482, 494, 495
ss. 97-100	482, 494
ss. 101-103	494, 495
ss. 104-106	494
s. 107	492, 495
s. 108	218, 224, 492, 495
ss. 109, 110	495
ss. 111, 112	753, 754
ss. 113, 114	753
s. 115	753, 754
s. 116	315, 753, 754
s. 117	753
ss. 118, 119	753, 754
ss. 120-122	753
s. 123	753, 754
s. 124	753, 755
s. 125	48, 492, 753, 755
ss. 126, 127	753, 755
ss. 128-131	753
s. 132	224, 753
s. 133	753
s. 134	753, 755
ss. 135, 136	753
ss. 137, 138	753, 755
s. 139	753
s. 140	753, 755

L.G.A.

	PAGE
s. 141	495, 753
s. 142	753
ss. 143-170	511
ss. 171-174	492, 511, 512
s. 175	511, 512
s. 176	492, 511
s. 177	511
ss. 178, 179	492, 511
s. 180	511
s. 181	492, 512, 675
s. 182	492, 512
ss. 183, 184	492
s. 185	142, 492, 512
s. 186	492
ss. 187-194	492, 780
s. 195	780
s. 196	492, 512
s. 197	492
s. 198	48, 492, 512
s. 200	492, 513
s. 201	137, 141, 144, 492, 513
s. 202	165, 492
s. 203	492, 513
s. 204	492, 513, 514
s. 205	492
s. 206-220	492, 514
ss. 221-229	511, 737
s. 230	48, 197, 295, 492, 511
ss. 231-234	511
ss. 235-248	498, 780
ss. 249-258	498
s. 259	495, 624
s. 260	48, 492, 624
ss. 261, 262	624
ss. 263, 264	492, 624
ss. 265, 266	624
s. 267	495
s. 268	495, 498
s. 269	499
s. 272	492
s. 273	140
s. 274	546
s. 278	442, 506
s. 290	398
s. 301	495
s. 306	231, 314
s. 307	168, 493, 506, 754
s. 308	167, 493
s. 310	191, 193
s. 312	219
s. 315	147
s. 317	315
s. 320	142, 493
s. 322	362, 391, 494
ss. 323-325	362, 494
s. 343	142, 167, 504, 511

c

	PAGE		PAGE
26 Geo. 5 & 1 Edw. 8, c. 49—		ss. 112, 113	352
29 Statutes 309. (Public		s. 116	167
Health Act, 1936)— <i>cont.</i>		s. 128	538
s. 347	505	s. 129	539
3rd Schd.	48, 295, 311, 349,	s. 130	152, 540
361, 366, 622		ss. 131, 132	539
Pt. V	229	s. 150	238
26 Geo. 5 & 1 Edw. 8, c. 50—		s. 154	522
30 Statutes 437. (Public		s. 169	362, 366, 533
Health (London) Act, 1936)	254,	s. 170	362, 533
260, 262, 491		ss. 171-174	362
s. 5	273	ss. 181-186	520
ss. 84, 107	262	1st Schd.	400, 525
s. 155	222	2nd Schd.	333, 400, 417,
s. 290	263		526
s. 291	262	3rd Schd.	525
7th Schd.	263	4th Schd.	528
26 Geo. 5 & 1 Edw. 8, c. 51—		8th Schd., para. 8	539
29 Statutes 565. (Housing		1 Edw. 8 & 1 Geo. 6, c. 5—	
Act, 1936) 34, 227, 327, 329, 415,		29 Statutes 183. (Trunk	
421, 472, 519, 520, 523		Roads Act, 1936)	37, 183,
ss. 1-3	520		569, 592
s. 5	521	s. 1	614
s. 6	217, 219, 521	s. 3	615
ss. 7, 8	521	s. 4	605, 606
ss. 9, 10	522	s. 6	607, 757
s. 11	522	s. 9	180
ss. 12, 13	523	s. 13	614
s. 15	399, 406, 435,	2nd Schd.	615
	522, 523	1 Edw. 8 & 1 Geo. 6, c. 22—	
s. 18	523	30 Statutes 377. (Local Gov-	
s. 24	520	ernment (Financial Provi-	
s. 25	435, 524, 525	sions) Act, 1937)—	
s. 26	400	s. 1	182, 183
s. 33	520	s. 2	185
ss. 34-36	529	s. 3	187
ss. 37, 39	520	ss. 4, 6	188
s. 40	528, 529	s. 7	268
s. 41	426	s. 8	185
s. 42	528	s. 9	164
s. 44	529	1st Schd.	185
s. 45	531	2nd Schd.	164, 182
s. 46	579	1 Edw. 8 & 1 Geo. 6, c. 25—	
s. 50	530	30 Statutes 179. (Educa-	
ss. 53, 56	520	tion) (Deaf Children) Act,	
s. 57	530, 531	1937)	715
ss. 58, 59	530	1 Edw. 8 & 1 Geo. 6, c. 27—	
s. 69	520	30 Statutes 383. (County	
ss. 71, 72, 74, 75, 83, 84	531	Councils Association Ex-	
s. 85	531, 540	penses (Amendment) Act,	
s. 87	531, 532	1937)	239
s. 88	532	1 Edw. 8 & 1 Geo. 6, c. 31—	
s. 89	533	30 Statutes 994. (Special	
ss. 90, 91, 93, 94	531	Areas (Amendment) Act,	
s. 103	520	1937)	567
s. 110	536		

Table of Statutes

XXXV

	PAGE		PAGE
I Edw. 8 & I Geo. 6, c. 33— 30 Statutes 313. (Diseases of Fish Act, 1937) . . .	620	I & 2 Geo. 6, c. 16. (Housing (Financial Provisions) Act, 1938) . . .	180, 519, 534, 536, 537
I Edw. 8 & I Geo. 6, c. 36— 30 Statutes 384. (Local Government (Members' Travelling Expenses) Act, 1937) . . .	239	s. 1 . . .	536, 538
I Edw. 8 & I Geo. 6, c. 40— 30 Statutes 695. (Public Health (Drainage of Trade Premises) Act, 1937) . . .	508, 622	s. 2 . . .	533, 536, 540
s. 5 . . .	218	s. 3 . . .	534, 536
Schd. . .	218	s. 4 . . .	537
I Edw. 8 & I Geo. 6, c. 46— 30 Statutes 712. (Physical Training and Recreation Act, 1937) . . .	475, 511, 515, 736, 737	s. 6 . . .	538
ss. 1, 2 . . .	737	s. 7 . . .	533, 538
s. 3 . . .	189, 737	s. 8 . . .	531
s. 4 . . .	48, 737	I & 2 Geo. 6, c. 19. (Rating and Valuation (Postpone- ment of Valuations) Act, 1938) . . .	158
s. 5 . . .	231	I & 2 Geo. 6, c. 23—31 Stat- utes 553. (Poor Law (Amendment) Act, 1938)— s. 1 . . .	684
s. 6 . . .	720, 737	I & 2 Geo. 6, c. 35. (Housing (Rural Workers) Amend- ment Act, 1938) . . .	519, 534
Schd. . .	736	I & 2 Geo. 6, c. 56. (Food and Drugs Act, 1938) . . .	34, 496, 743, 745, 747, 748
I Edw. 8 & I Geo. 6, c. 50— 30 Statutes 3. (Livestock Industry Act, 1937)— ss. 14, 16, 25 . . .	749	ss. 1-3 . . .	496, 497
I Edw. 8 & I Geo. 6, c. 52— 30 Statutes 821. (Chairmen of Traffic Commissioners, etc. (Tenure of Office) Act, 1937) . . .	775	ss. 4-10 . . .	496
s. 1 . . .	778	s. 44 . . .	747, 748
I Edw. 8 & I Geo. 6, c. 54— 30 Statutes 742. (Finance Act, 1937)— s. 5 . . .	178, 183	ss. 45-56 . . .	748
I Edw. 8 & I Geo. 6, c. 67— 30 Statutes 201. (Factories Act, 1937)— s. 129 . . .	337	ss. 60-62 . . .	749
I Edw. 8 & I Geo. 6, c. 68— 30 Statutes 385. (Local Government Superannuation Act, 1937) . . .	126, 295	s. 64 . . .	497, 749
s. 35 . . .	400	s. 66 . . .	356, 497
I & 2 Geo. 6, c. 6—30 Statutes 1025. (Air-Raid Precautions Act, 1937) . . .	37, 475	ss. 68, 79 . . .	497
s. 1 . . .	319, 662	ss. 81, 84 . . .	498
s. 2 . . .	319	s. 100 . . .	497
s. 3 . . .	319, 348, 662	I & 2 Geo. 6, c. 63. (Admin- istration of Justice (Miscel- laneous Provisions) Act, 1938) . . .	22, 379, 430
s. 8 . . .	189, 662	s. 7 . . .	343, 376, 385, 389, 392
Schd. . .	189, 662	s. 8 . . .	385, 389
		s. 9 . . .	376, 385, 387
		s. 10 . . .	385
		I & 2 Geo. 6, c. 72. (Fire Brigades Act, 1938) . . .	34, 665
		s. 1 . . .	664, 665
		ss. 2-4 . . .	665
		s. 5 . . .	664
		s. 6 . . .	663
		ss. 8-12 . . .	664
		ss. 13, 14 . . .	665
		s. 30 . . .	663
		3rd Schd. . .	663
		2 & 3 Geo. 6, c. 18—32 Statutes 247. (Local Government Superannuation Act, 1939) . . .	126

	PAGE		PAGE
2 & 3 Geo. 6, c. 21—32 <i>Statutes</i> 223. (Limitation Act, 1939)	456, 459, 460	3 & 4 Geo. 6, c. 13—33 <i>Statutes</i> 519. (Old Age and Widows' Pensions Act, 1940)—	
s. 21	456, 459	s. 16	674
s. 22	460	4 & 5 Geo. 6, c. 3—33 <i>Statutes</i> 105. (Local Elections and Register of Electors (Temporary Provisions) Act, 1940)	92
s. 34	456	4 & 5 Geo. 6, c. 22—34 <i>Statutes</i> 223. (Fire Services (Emergency Provisions) Act, 1941)	326, 665
Sched.	456	4 & 5 Geo. 6, c. 33—34 <i>Statutes</i> 175. (Local Government (Financial Provisions) Act, 1941)	184, 186
2 & 3 Geo. 6, c. 31—32 <i>Statutes</i> 813. (Civil Defence Act, 1939)	189, 475, 662	4 & 5 Geo. 6, c. 49—34 <i>Statutes</i> 90. (Local Elections and Register of Electors (Temporary Provisions) Act, 1941)	92
s. 70	553	5 & 6 Geo. 6, c. 21—35 <i>Statutes</i> 174. (Finance Act, 1942)—	
2 & 3 Geo. 6, c. 40—32 <i>Statutes</i> 259. (London Government Act, 1939)	254, 258, 263	ss. 10, 11	792
ss. 1, 7	261	6th Sched.	792
ss. 17, 21, 23	264	5 & 6 Geo. 6, c. 23—35 <i>Statutes</i> 55. (Minister of Works Act, 1942)	549
ss. 77—84, 95, 96	260	5 & 6 Geo. 6, c. 32—35 <i>Statutes</i> 152. (Housing (Rural Workers) Act, 1942)	473, 519, 533, 534
ss. 124, 145	263	5 & 6 Geo. 6, c. 38—35 <i>Statutes</i> 76. (Local Elections and Register of Electors (Temporary Provisions) Act, 1942)	92
s. 146	262	6 & 7 Geo. 6, c. 5—36 <i>Statutes</i> 40. (Minister of Town and Country Planning Act, 1943)—	
8th Sched.	262, 265	s. 1	549
2 & 3 Geo. 6, c. 62—32 <i>Statutes</i> 930. (Emergency Powers (Defence) Act, 1939)	184, 186	6 & 7 Geo. 6, c. 8—36 <i>Statutes</i> 237. (Police (Appeals) Act, 1943)	659
2 & 3 Geo. 6, c. 73—32 <i>Statutes</i> 1003. (Housing (Emergency Powers) Act, 1939)	520	6 & 7 Geo. 6, c. 21—36 <i>Statutes</i> 334. (War Damage Act, 1943)	520, 567
2 & 3 Geo. 6, c. 91—32 <i>Statutes</i> 1106. (National Registration Act, 1939)	94	6 & 7 Geo. 6, c. 29—36 <i>Statutes</i> 239. (Town and Country Planning (Interim Development) Act, 1943)	37, 549, 558, 602
2 & 3 Geo. 6, c. 94—32 <i>Statutes</i> 1118. (Local Government Staffs (War Service) Act, 1939)—		s. 1	550, 556
s. 10	103		
2 & 3 Geo. 6, c. 103—32 <i>Statutes</i> 1149. (Police and Firemen (War Service) Act, 1939)	659		
2 & 3 Geo. 6, c. 111—32 <i>Statutes</i> 1223. (Education (Emergency) Act, 1939)	701		
2 & 3 Geo. 6, c. 115—32 <i>Statutes</i> 1230. (Local Elections and Register of Electors (Temporary Provisions) Act, 1939)	45, 50, 53, 60, 63, 75, 80, 92, 93, 94, 108		
s. 1	92		
s. 5	71		
s. 6	67, 75		
s. 10	92		
3 & 4 Geo. 6, c. 12—33 <i>Statutes</i> 361. (Rating and Valuation (Postponement of Valuations) Act, 1940)	158		

PAGE	PAGE
6 & 7 Geo. 6, c. 29—36 <i>Statutes</i> 239. (Town and Country Planning (Interim Development) Act, 1943)— <i>cont.</i>	s. 1 . . . 347, 694 s. 6 . . . 694, 705, 726, 734 s. 7 . . . 694, 724 s. 8 . . . 721, 723, 727 s. 9 . . . 695, 699, 711, 712, 723, 727
ss. 2, 3 . . . 559	s. 10 . . . 695, 708
s. 4 . . . 560	s. 11 . . . 349, 695, 727
s. 5 . . . 560, 564	s. 12 . . . 695, 727
ss. 6-8 . . . 560	ss. 13, 14 . . . 695
s. 9 . . . 144, 552, 553	s. 15 . . . 695, 698, 699, 712
6 & 7 Geo. 6, c. 34—36 <i>Statutes</i> 131. (Restriction of Ribbon Development (Temporary Development) Act, 1943)—	s. 17 . . . 710
s. 1 . . . 606	s. 18 . . . 710, 711
6 & 7 Geo. 6, c. 48—36 <i>Statutes</i> 90. (Parliament (Elections and Meeting) Act, 1943)	s. 19 . . . 711
94, 95	s. 20 . . . 708
7 & 8 Geo. 6, c. 2—36 <i>Statutes</i> 117. (Local Elections and Register of Electors (Temporary Provisions) Act, 1943)	s. 23 . . . 708, 709
92	s. 24 . . . 714, 730
s. 1 . . . 71	s. 25 . . . 695, 698, 699, 710
Schd. . . . 71	s. 26 . . . 695, 698, 700
7 & 8 Geo. 6, c. 22—37 <i>Statutes</i> 400. (Police and Firemen (War Service) Act, 1944)	s. 27 . . . 695, 698, 700, 710, 714
659	s. 28 . . . 695, 698, 700, 710, 714
7 & 8 Geo. 6, c. 23—37 <i>Statutes</i> 286, 314, 530. (Finance Act, 1944)	s. 29 . . . 695, 698, 700
178	s. 30 . . . 695, 698
ss. 8, 9 . . . 792	s. 33 . . . 695, 716
7 & 8 Geo. 6, c. 24—37 <i>Statutes</i> 238. (Parliamentary Electors (War-Time Registration) Act, 1944)	s. 34 . . . 695, 716, 717
94	s. 35 . . . 695, 701, 715
7 & 8 Geo. 6, c. 26—37 <i>Statutes</i> 577. (Rural Water Supplies and Sewerage Act, 1944)	s. 36 . . . 701, 702
168, 477	s. 37 . . . 701
s. 1 . . . 753	s. 38 . . . 701, 717
s. 2 . . . 753, 754	ss. 39, 40 . . . 701
s. 3 . . . 753	s. 41 . . . 695, 726, 735
s. 6 . . . 167, 493	s. 42 . . . 695, 726
7 & 8 Geo. 6, c. 29—37 <i>Statutes</i> 299. (Food and Drugs (Milk and Dairies) Act, 1944)	ss. 43-46 . . . 695, 724
38, 496	s. 47 . . . 695
7 & 8 Geo. 6, c. 31—37 <i>Statutes</i> 123. (Education Act, 1944)	s. 48 . . . 695, 719
9, 37, 38, 65, 189,	s. 49 . . . 695, 718
227, 292, 319, 410,	s. 50 . . . 721
424, 693, 694, 698,	s. 52 . . . 721
699, 705, 713, 726	s. 53 . . . 515, 695, 720, 736, 737, 738
	s. 55 . . . 721
	s. 57 . . . 717
	s. 58 . . . 722
	s. 59 . . . 721
	s. 61 . . . 695, 702
	s. 62 . . . 695, 730
	s. 64 . . . 711
	s. 67 . . . 408, 409
	s. 68 . . . 348, 695
	ss. 70-75 . . . 695
	s. 77 . . . 350
	s. 81 . . . 695, 722
	s. 83 . . . 239
	s. 84 . . . 695

	PAGE		PAGE
7 & 8 Geo. 6, c. 31—37 <i>Statutes</i> 123. (Education Act, 1944)— <i>cont.</i>		s. 24 . . .	550, 566
s. 88 . . .	124, 348	s. 25 . . .	550, 566
s. 89 . . .	358, 730	ss. 26-29 . . .	550
s. 91 . . .	202, 208	s. 30 . . .	550, 566
s. 92 . . .	350	s. 31 . . .	551
s. 98 . . .	126	ss. 32-39 . . .	551, 561
s. 99 . . .	362, 363, 695	s. 40 . . .	551, 552
s. 100 . . .	179, 352, 695, 723, 729	ss. 41-43 . . .	551
s. 101 . . .	179, 352, 695, 729	s. 44 . . .	564
s. 102 . . .	695, 712	ss. 45, 46 . . .	551
ss. 103-106 . . .	695	ss. 57-59 . . .	551, 567
s. 110 . . .	729	s. 60 . . .	551
s. 114 . . .	710, 716	ss. 61, 62 . . .	551, 567
s. 117 . . .	260, 261	8 & 9 Geo. 6, c. 3—37 <i>Statutes</i> 242. (Local Elections and Register of Electors (Temporary Provisions) Act, 1944)	92
s. 121 . . .	736	8 & 9 Geo. 6, c. 5. (Representation of the People Act, 1945)	26, 45, 50, 53, 60, 92, 95, 99
1st Schd. . .	694, 705, 726, 734	s. 1 . . .	95, 98, 100
Pt. I . . .	136, 146, 708	s. 2 . . .	98
Pt. II . . .	137, 706, 707	s. 4 . . .	92, 93
Pt. II, para. 7 . . .	141	s. 5 . . .	93
para. 9 . . .	129	s. 7 . . .	100
Pt. III . . .	147, 707	s. 13 . . .	94
5th Schd. . .	700	s. 15 . . .	95
7th Schd. . .	730	2nd Schd. . .	95
9th Schd. . .	736	8 & 9 Geo. 6, c. 10. (Compensation of Displaced Officers (War Service) Act, 1945)	126
Pt. I . . .	227	8 & 9 Geo. 6, c. 11. (Police (His Majesty's Inspectors of Constabulary) Act, 1945)	655
7 & 8 Geo. 6, c. 33—37 <i>Statutes</i> 412. (Housing (Temporary Provisions) Act, 1944)	180, 473, 519, 530, 531, 534, 536, 537	8 & 9 Geo. 6, c. 14. (Teachers (Superannuation) Act, 1945)	126, 731
7 & 8 Geo. 6, c. 35—37 <i>Statutes</i> 72. (National Fire Service Regulations (Indemnity) Act, 1944)	326	8 & 9 Geo. 6, c. 15. (Licensing Planning (Temporary Provisions) Act, 1945)	551
7 & 8 Geo. 6, c. 36—37 <i>Statutes</i> 413. (Housing (Temporary Accommodation) Act, 1944)	473, 520	ss. 1, 2 . . .	552, 792
7 & 8 Geo. 6, c. 47—37 <i>Statutes</i> 420. (Town and Country Planning Act, 1944)	229, 544, 550, 558, 565, 602, 603	s. 3 . . .	792
ss. 1-4 . . .	550, 565	ss. 4, 5 . . .	552, 792
ss. 5-8 . . .	190, 550	ss. 6-9 . . .	792
ss. 9, 10 . . .	550, 565	8 & 9 Geo. 6, c. 18. (Local Authorities Loans Act, 1945)—	194
s. 11 . . .	550	ss. 1, 9 . . .	194
s. 12 . . .	565, 566	8 & 9 Geo. 6, c. 36. (Distribution of Industry Act, 1945)	475, 567
ss. 13, 14, 18 . . .	565	ss. 1-4 . . .	567
s. 19 . . .	550, 551, 565, 566	ss. 5, 6 . . .	568
s. 20 . . .	550, 565, 566	s. 7 . . .	567
ss. 21, 22 . . .	550, 566		
s. 23 . . .	550, 565, 566		

	PAGE		PAGE
8 & 9 Geo. 6, c. 36. (Distri- bution of Industry Act, 1945)— <i>cont.</i>		ss. 1, 2 . . .	751
s. 9	568	ss. 3-6 . . .	752
1st Schd.	567	s. 8	146, 752
8 & 9 Geo. 6, c. 38. (Local Government (Boundary Commission) Act, 1945)	31, 38, 54, 63, 65, 67, 73, 75, 83, 84, 86, 269, 309, 366	ss. 9, 10, 12-16 . . .	752
s. 1	76, 269	s. 17	218, 224, 752
s. 2	76, 77	ss. 18-22 . . .	752
s. 3	78, 85	s. 28	753, 754
s. 4	79	ss. 29, 30 . . .	755
s. 5	78	s. 31	754
s. 6	75	s. 59	752
s. 7	75, 77	s. 62	753
1st Schd., para. 1 . . .	76	3rd Schd.	752
2nd Schd.	79	4th Schd.	754
8 & 9 Geo. 6, c. 39. (Housing (Temporary Accommoda- tion) Act, 1945)	473, 520	5th Schd.	753
8 & 9 Geo. 6, c. 42. (Water Act, 1945)	311, 477, 624, 743, 751, 752, 753	9 Geo. 6, c. 12. (Civil Defence (Suspension of Powers) Act, 1945)	663
		9 & 10 Geo. 6, c. 18. (Statu- tory Orders (Special Pro- cedure) Act, 1945)	337
		9 & 10 Geo. 6, c. 20. (Build- ing Materials and Housing Act, 1945)—	
		s. 6	541

TABLE OF CASES

A

	PAGE
ACTON LOCAL BOARD <i>v.</i> Batten (1884), 28 Ch. D. 283; 54 L. J. Ch. 251; 52 L. T. 17; 49 J. P. 357 ...	504
A.-G. <i>v.</i> Andrews (1850), 2 Mac. & G. 225; 2 H. & Tw. 431; 20 L. J. Ch. 467; 15 L. T. O. S. 322; 14 Jur. 905	297
— <i>v.</i> Ashborne Recreation Ground Co., [1903] 1 Ch. 101; 72 L. J. Ch. 67; 87 L. T. 561; 67 J. P. 73; 51 W. R. 125; 19 T. L. R. 39; 47 Sol. Jo. 50; 1 L. G. R. 146 ...	382
— <i>v.</i> Aspinall (1837), 2 My. & Cr. 613; 7 L. J. Ch. 51; 1 J. P. 4; 1 Jur. 812 ...	195, 290
— <i>v.</i> Birmingham, Tame and Rea Drainage Board (1881), 17 Ch. D. 685; 50 L. J. Ch. 786; 44 L. T. 906; 46 J. P. 36; 29 W. R. 793 ...	624
— <i>v.</i> Brecon Corporation (1878), 10 Ch. D. 204; 48 L. J. Ch. 153; 40 L. T. 52; 43 J. P. 366; 27 W. R. 332 ...	297
— <i>v.</i> De Winton, [1906] 2 Ch. 106; 75 L. J. Ch. 612; 70 J. P. 368; 54 W. R. 499; 22 T. L. R. 446; 50 Sol. Jo. 405; 4 L. G. R. 549 ...	127, 196, 209
— <i>v.</i> Dorking Union (1882), 20 Ch. D. 595; 51 L. J. Ch. 585; 46 L. T. 573; 30 W. R. 579 ...	623
— <i>v.</i> Great Eastern Railway Co. (1880), 5 App. Cas. 473; 49 L. J. Ch. 545; 42 L. T. 810; 44 J. P. 648; 28 W. R. 769 ...	285
— <i>v.</i> Keymer Brick and Tile Co., Ltd. (1903), 67 J. P. 434; 1 L. G. R. 654 ...	482
— <i>v.</i> Leeds Corporation, [1929] 2 Ch. 291; 99 L. J. Ch. 9; 141 L. T. 658; 93 J. P. 153; 27 L. G. R. 351 ...	287
— <i>v.</i> Leicester Corporation, [1943] Ch. 86; [1943] 1 All E. R. 146; 112 L. J. Ch. 97; 168 L. T. 229; 107 J. P. 65; 59 T. L. R. 118; 41 L. G. R. 82; 87 Sol. Jo. 57 ...	290
— <i>v.</i> Lichfield Corporation (1848), 11 Beav. 120; 17 L. J. Ch. 472 ...	195, 290
— <i>v.</i> Manchester Corporation, [1906] 1 Ch. 643; 75 L. J. Ch. 330; 70 J. P. 201; 54 W. R. 307; 22 T. L. R. 261; 4 L. G. R. 365 ...	287, 288
— <i>v.</i> Merthyr Tydfil Union, [1900] 1 Ch. 516; 69 L. J. Ch. 299; 82 L. T. 662; 64 J. P. 276; 48 W. R. 403; 16 T. L. R. 251; 44 Sol. Jo. 294 ...	205

A.-G. v. Newcastle-upon-Tyne Corporation and North-Eastern Railway Co. (1889), 23 Q. B. D. 492; 58 L. J. Q. B. 558; 54 J. P. 292; affirmed <i>sub nom.</i> Newcastle-upon-Tyne Corporation v. A.-G., A.-G. v. Newcastle-upon-Tyne Corporation and North-Eastern Railway Co., [1892] A. C. 568; 62 L. J. Q. B. 72; 67 L. T. 728; 56 J. P. 836; 1 R. 1	196, 290
— v. Poole Corporation, [1938] 1 Ch. 23; [1937] 3 All. E. R. 608; 106 L. J. Ch. 319; 157 L. T. 209; 101 J. P. 498; 53 T. L. R. 924; 81 Sol. Jo. 627; 35 L. G. R. 472	514
— v. Rickmansworth Urban District Council (1902), 86 L. T. 521; 66 J. P. 410; 18 T. L. R. 481	297
— v. Sharp, [1931] 1 Ch. 121; 99 L. J. Ch. 441; 143 L. T. 367; 94 J. P. 234; 46 T. L. R. 554; 74 Sol. Jo. 504; 28 L. G. R. 513	382
— v. Smethwick Corporation, [1932] 1 Ch. 562; 101 L. J. Ch. 137; 146 L. T. 480; 96 J. P. 105; 48 T. L. R. 227; 30 L. G. R. 117	285
— v. Swansea Corporation, [1898] 1 Ch. 602; 67 L. J. Ch. 356; 78 L. T. 412; 62 J. P. 408; 46 W. R. 534; 14 T. L. R. 322	297
— v. Todmorden Borough Council, [1937] 4 All. E. R. 588	447
— v. Ulverston Urban District Council, [1944] Ch. 242; [1944] 1 All. E. R. 475; 113 L. J. Ch. 122; 170 L. T. 295; 108 J. P. 158; 60 T. L. R. 256; 88 Sol. Jo. 111; 42 L. G. R. 167	104
— v. West Ham Corporation, [1910] 2 Ch. 560; 80 L. J. Ch. 105; 103 L. T. 394; 74 J. P. 406; 26 T. L. R. 683; 9 L. G. R. 433	459
— v. West Riding of Yorkshire County Council, [1907] A. C. 29; 76 L. J. K. B. 97; 95 L. T. 845; 71 J. P. 41; 23 T. L. R. 171; 51 Sol. Jo. 129; 5 L. G. R. 89	709
— v. Wilson (1840), Cr. & Ph. 1; 10 L. J. Ch. 53; 4 Jur. 1174	195, 196
A.-G. & Spalding Rural District Council v. Garner, [1907] 2 K. B. 480; 76 L. J. K. B. 965; 97 L. T. 486; 71 J. P. 357; 23 T. L. R. 563; 5 L. G. R. 944	381
Agnew v. Manchester Corporation (1902), 67 J. P. 174; 1 L. G. R. 9	140
Alderton v. Essex County Council, [1937] Ch. 541; [1937] 3 All. E. R. 219; 106 L. J. Ch. 314; 157 L. T. 100; 101 J. P. 434; 53 T. L. R. 834; 81 Sol. Jo. 528; 35 L. G. R. 409	165
Allen v. Hornchurch Urban District Council, [1938] 2 K. B. 654; [1938] 2 All. E. R. 431; 107 L. J. K. B. 741; 159 L. T. 473; 102 J. P. 393; 54 T. L. R. 1063; 82 Sol. Jo. 729; 36 L. G. R. 441	398, 600
Anderson v. Dublin Corporation (1885), 15 L. R. Ir. 410	607

	PAGE
Anon. (1468), Y. B. 8 Edw. 4, fo. 9, pl. 7	571
Arlidge v. Islington Corporation, [1909] 2 K. B. 127; 78 L. J. K. B. 553; 100 L. T. 903; 73 J. P. 301; 25 T. L. R. 470; 7 L. G. R. 649	222
— v. Tottenham Urban District Council, [1922] 2 K. B. 719; 92 L. J. K. B. 21; 127 L. T. 841; 86 J. P. 171; 38 T. L. R. 819; 66 Sol. Jo. 694; 20 L. G. R. 594	415
Ashbury Railway Carriage Co. v. Riche (1875), L. R. 7 H. L. 653; 44 L. J. Ex. 185; 33 L. T. 450; 24 W. R. 794	285
Associated Cinema Properties, Ltd. v. Hampstead Borough Council, [1944] K. B. 49; [1943] 2 All E. R. 696; 113 L. J. K. B. 37; 169 L. T. 391; 108 J. P. 10; 60 T. L. R. 65; 88 Sol. Jo. 25; affirmed, [1944] K. B. 412; [1944] 1 All E. R. 436; 113 L. J. K. B. 446; 170 L. T. 266; 108 J. P. 155; 42 L. G. R. 175, C. A.	155
Atkinson v. Newcastle and Gateshead Waterworks Co. (1877), 2 Ex. D. 441; 46 L. J. Ex. 775; 36 L. T. 761; 25 W. R. 794	445

B

BAINBRIDGE v. Postmaster-General, [1906] 1 K. B. 178; 75 L. J. K. B. 366; 94 L. T. 120; 54 W. R. 221; 22 T. L. R. 70	373
Baker v. Portsmouth Corporation (1878); 3 Ex. D. 157; 47 L. J. Q. B. 223; 37 L. T. 822; 42 J. P. 278; 26 W. R. 303	597
Bamford v. Turnley (1862), 3 B. & S. 66; 31 L. J. Q. B. 286; 6 L. T. 721; 9 Jur. N. S. 377; 10 W. R. 803	481
Banbury Urban Sanitary Authority v. Page (1881), 8 Q. B. D. 97; 51 L. J. M. C. 21; 45 L. T. 759; 46 J. P. 184; 30 W. R. 415	482
Barlow, Re (1861), 30 L. J. Q. B. 271; 5 L. T. 289; 25 J. P. 727	391
Barnes Corporation, Re. Ex parte Hutter, [1933] 1 K. B. 668; 102 L. J. K. B. 641; 148 L. T. 328; 97 J. P. 76; 49 T. L. R. 152; 31 L. G. R. 110	113, 387
Bateman v. Bluck (1852), 18 Q. B. 870; 21 L. J. Q. B. 406; 17 J. P. 4; 17 Jur. 386	571
Bean (Wm.) & Sons v. Flaxton Rural District Council, [1929] 1 K. B. 450; 98 L. J. K. B. 20; 139 L. T. 320; 92 J. P. 121; 26 L. G. R. 335	223
Benjamin v. Storr (1874), L. R. 9 C. P. 400; 43 L. J. C. P. 162; 30 L. T. 362; 22 W. R. 631	380
Bessemer & Co., Ltd. v. Gould (1912), 107 L. T. 298; 76 J. P. 349; 10 L. G. R. 744; 23 Cox C. C. 145	318
Betts v. Receiver for the Metropolitan Police District and Carter Paterson & Co., [1932] 2 K. B. 595; 101 L. J. K. B. 588; 147 L. T. 336; 96 J. P. 327; 48 T. L. R. 517; 76 Sol. Jo. 474; 30 L. G. R. 347	458

Birkdale District Electric Supply Co. v. Southport Corporation, [1926] A. C. 355; 95 L. J. Ch. 587; 134 L. T. 673; 90 J. P. 77; 42 T. L. R. 303; 24 L. G. R. 157	449
Bishop v. Deakin, [1936] Ch. 409; [1936] 1 All E. R. 255; 105 L. J. Ch. 193; 154 L. T. 691; 100 J. P. 201; 52 T. L. R. 284; 80 Sol. Jo. 165; 34 L. G. R. 345	106,
	119, 120, 388
Board of Education v. Rice, [1911] A. C. 179; 80 L. J. K. B. 796; 104 L. T. 689; 75 J. P. 393; 27 T. L. R. 378; 55 Sol. Jo. 440; 9 L. G. R. 652	422, 424
Bonanza Creek Gold Mining Co., Ltd. v. R., [1916] 1 A. C. 566; 85 L. J. P. C. 114; 114 L. T. 765; 32 T. L. R. 333	287
Booth v. Arnold, [1895] 1 Q. B. 571; 64 L. J. Q. B. 443; 72 L. T. 310; 59 J. P. 215; 43 W. R. 360; 11 T. L. R. 246; 39 Sol. Jo. 314; 14 R. 326	131
Bourne & Hollingsworth v. St. Marylebone Borough Council (1908), 72 J. P. 129; 24 T. L. R. 322; 6 L. G. R. 406	453
Bournemouth Commissioners v. Watts (1884), 14 Q. B. D. 87; 54 L. J. Q. B. 93; 51 L. T. 823; 49 J. P. 102; 33 W. R. 280; 1 T. L. R. 142	454
Bowles v. Bank of England, [1913] 1 Ch. 57; 82 L. J. Ch. 124; 108 L. T. 95; 29 T. L. R. 42; 57 Sol. Jo. 43; 6 Tax Cas. 136	327
Bowman, Re, [1932] 2 K. B. 621; 101 L. J. K. B. 798; 147 L. T. 150; 96 J. P. 207; 48 T. L. R. 351; 76 Sol. Jo. 273; 30 L. G. R. 245	526
Boyce v. Paddington Borough Council, [1903] 1 Ch. 109; 72 L. J. Ch. 28; 87 L. T. 564; 67 J. P. 23; 51 W. R. 109; 19 T. L. R. 38; 47 Sol. Jo. 50; 1 L. G. R. 98	380
— v. —, [1906] A. C. 1; 75 L. J. Ch. 4; 93 L. T. 673; 70 J. P. 41; 54 W. R. 317; 22 T. L. R. 55; 50 Sol. Jo. 41; 4 L. G. R. 19	380
Bradford Corporation v. Myers, [1916] 1 A. C. 242; 85 L. J. K. B. 146; 114 L. T. 83; 80 J. P. 121; 32 T. L. R. 113; 60 Sol. Jo. 74; 14 L. G. R. 130	456, 457
Brighton (Everton Place Area) Housing Order, 1937, Re, Robins and Sons, Ltd.'s Application, [1938] 2 All E. R. 146; 158 L. T. 496; 102 J. P. 253; 54 T. L. R. 637	421, 525
Bristol Grand Jury, Charge to the (1832), 5 C. & P. 261	660
Broadbent v. Rotherham Corporation, [1917] 2 Ch. 31; 86 L. J. Ch. 501; 117 L. T. 120; 81 J. P. 193; 61 Sol. Jo. 460; 15 L. G. R. 467	417
Brooks, Jenkins & Co. v. Torquay Corporation, [1902] 1 K. B. 601; 71 L. J. K. B. 109; 85 L. T. 785; 66 J. P. 293; 18 T. L. R. 139	450

	PAGE
Brown v. Dagenham Urban Council, [1929] 1 K. B. 737; 98 L. J. K. B. 565; 140 L. T. 615; 93 J. P. 147; 45 T. L. R. 284; 73 Sol. Jo. 144; 27 L. G. R. 225 ...	125
— v. Holyhead Local Board of Health (1862), 1 H. & C. 601; 1 New Rep. 63; 32 L. J. Ex. 25; 7 L. T. 332; 27 J. P. 184; 11 W. R. 71 ...	221
Butchers' Co. v. Morey (1790), 1 Hy. Bl. 370 ...	214
Butler, Re, [1938] 2 K. B. 210; [1938] 2 All E. R. 279; 107 L. J. K. B. 419; 159 L. T. 47; 54 T. L. R. 655; 36 L. G. R. ...	334, 526
Butterworth v. West Riding of Yorkshire Rivers Board, [1909] A. C. 45; 78 L. J. K. B. 203; 100 L. T. 85; 73 J. P. 89; 25 T. L. R. 117; 7 L. G. R. 189 ...	622

C

CABABÉ v. Walton-on-Thames Urban Council, [1914] A. C. 102; 83 L. J. K. B. 243; 110 L. T. 674; 78 J. P. 129; 58 Sol. Jo. 270; 12 L. G. R. 104 ...	596
Campbell v. Paddington Corporation, [1911] 1 K. B. 869; 80 L. J. K. B. 739; 104 L. T. 394; 75 J. P. 277; 27 T. L. R. 232; 9 L. G. R. 387 ...	438
Cant v. Harley & Sons, Ltd., [1938] 2 All E. R. 768; 36 L. G. R. 465 ...	496
Canterbury (Viscount) v. A.-G. (1843), 1 Ph. 306; 4 St. Tr. N. S. 767; 12 L. J. Ch. 281; 7 Jur. 224 ...	372
Caseley v. Bristol Corporation, [1944] 1 All E. R. 14 ...	444
Chaplin (W. H.) & Co., Ltd. v. Westminster Corporation, [1901] 2 Ch. 329; 70 L. J. Ch. 679; 85 L. T. 88; 65 J. P. 661; 49 W. R. 586; 17 T. L. R. 576; 45 Sol. Jo. 597 ...	380, 574
Chester (Goodtitle d.) v. Alker and Elmes (1757), 1 Burr 133; 1 Keny. 427 ...	571
Ching v. Surrey County Council, [1910] 1 K. B. 736; 79 L. J. K. B. 481; 102 L. T. 414; 74 J. P. 187; 26 T. L. R. 355; 54 Sol. Jo. 360; 8 L. G. R. 369 ...	446
Citizens' Life Assurance Co. v. Brown, [1904] A. C. 423; 73 L. J. P. C. 102; 90 L. T. 739; 53 W. R. 176; 20 T. L. R. 497 ...	438
Clegg Parkinson & Co. v. Earby Gas Co., [1896] 1 Q. B. 592; 65 L. J. Q. B. 339; 44 W. R. 606; 12 T. L. R. 241 ...	384
Cleverton v. St. Germain's Union Rural Sanitary Authority (1886), 56 L. J. Q. B. 83; 3 T. L. R. 43 ...	297
Cohen v. West Ham Corporation, [1933] Ch. 814; 102 L. J. Ch. 305; 149 L. T. 271; 97 J. P. 155; 31 L. G. R. 205 ...	417
Collins v. Hornsey Urban Council, [1901] 2 K. B. 180; 70 L. J. K. B. 802; 84 L. T. 839; 65 J. P. 600; 49 W. R. 620; 17 T. L. R. 487; 45 Sol. Jo. 523; 20 Cox C. C. 8 ...	607

Table of Cases

xlv

	PAGE
Consett Iron Co. v. Assessment Committee for No. 5 or North-Western Area of County of Durham, [1931] A. C. 396; 100 L. J. K. B. 242; 144 L. T. 649; 95 J. P. 98; 47 T. L. R. 301; 29 L. G. R. 231	156
Cook v. Ward (1877), 2 C. P. D. 255; 46 L. J. Q. B. 554; 36 L. T. 893; 25 W. R. 593	140
Cooke v. Green (1823), 11 Price 736	572
Cooper v. Wandsworth Board of Works (1863), 14 C. B. N. S. 180; 2 New Rep. 31; 32 L. J. C. P. 185; 8 L. T. 278; 9 Jur. N. S. 1155; 11 W. R. 646	416, 417
Cooper v. Wilson, [1937] 2 K. B. 309; [1937] 2 All E. R. 726; 106 L. J. K. B. 728; 157 L. T. 290; 101 J. P. 349; 53 T. L. R. 623; 81 Sol. Jo. 357; 35 L. G. R. 436 397, 409, 650	
Coulsdon and Purley Urban District Council v. Surrey County Council, [1934] Ch. 694; 103 L. J. Ch. 342; 151 L. T. 522; 98 J. P. 437; 78 Sol. Jo. 535; 32 L. G. R. 447 162, 383	
Cowley v. Newmarket Local Board, [1892] A. C. 345; 62 L. J. Q. B. 65; 67 L. T. 486; 56 J. P. 805; 8 T. L. R. 788; 1 R. 45	447
Crampton v. Varna Railway Co. (1872), L. R. 7 Ch. 562; 41 L. J. Ch. 817; 20 W. R. 713	455
Crook v. Corporation of Seaford (1871), L. R. 6 Ch. 551; 25 L. T. 1; 35 J. P. 804; 19 W. R. 938	454
Crossley & Sons, Ltd. v. Lightowler (1867), L. R. 2 Ch. 478; 36 L. J. Ch. 584; 16 L. T. 438; 15 W. R. 801	617
Cruse v. Mount, [1933] Ch. 278; 102 L. J. Ch. 74; 148 L. T. 259; 49 T. L. R. 87; 76 Sol. Jo. 902	520
Cubitt v. Lady Caroline Maxse (1873), L. R. 8 C. P. 704; 42 L. J. C. P. 278; 29 L. T. 244; 37 J. P. 808; 21 W. R. 789	575

D

DALE'S CASE (1881), 6 Q. B. D. 376; 50 L. J. Q. B. 234; 43 L. T. 769; 45 J. P. 284	326
Darley v. R. (1846), 12 Cl. & Fin. 520	387
Davies v. Seisdon Union, [1908] A. C. 315; 77 L. J. K. B. 742; 99 L. T. 30; 72 J. P. 305; 24 T. L. R. 651; 52 Sol. Jo. 532; 6 L. G. R. 764; 2 Konst. Rat. App. 546	156
Davis v. Bromley Corporation, [1908] 1 K. B. 170; 77 L. J. K. B. 51; 97 L. T. 705; 71 J. P. 513; 24 T. L. R. 11; 51 Sol. Jo. 823; 5 L. G. R. 1229	397, 420
Dawes v. Hawkins (1860), 8 C. B. N. S. 848; 29 L. J. C. P. 343; 4 L. T. 288; 25 J. P. 502; 7 Jur. N. S. 262	579
Dawson & Co. v. Bingley Urban District Council, [1911] 2 K. B. 149; 80 L. J. K. B. 842; 104 L. T. 659; 75 J. P. 289; 27 T. L. R. 308; 55 Sol. Jo. 346; 9 L. G. R. 502	447

	PAGE
Denby (William) & Sons, Ltd. <i>v.</i> Minister of Health, [1936]	
1 K. B. 337; 105 L. J. K. B. 134; 154 L. T. 180; 100	
J. P. 107; 52 T. L. R. 173; 80 Sol. Jo. 33; 34 L. G. R.	
61	426, 525
Devonport Corporation <i>v.</i> Tozer, [1903] 1 Ch. 759; 72 L. J. Ch.	
411; 88 L. T. 113; 67 J. P. 269; 52 W. R. 6; 19 T. L. R.	
257; 47 Sol. Jo. 318; 1 L. G. R. 421	383
Dimes <i>v.</i> Grand Junction Canal (1852), 3 H. L. C. 794; 8 St. Tr.	
N. S. 85; 19 L. T. O. S. 317; 17 Jur. 73	416
Dodwell <i>v.</i> Oxford University (1680), 2 Vent. 33	214
Dorchester Union <i>v.</i> Weymouth Union (1885), 16 Q. B. D. 31;	
55 L. J. M. C. 44; 54 L. T. 52; 50 J. P. 310; 2 T. L. R.	
56	691
Douglass <i>v.</i> Rhyl Urban District Council, [1913] 2 Ch. 407;	
82 L. J. Ch. 537; 109 L. T. 30; 77 J. P. 373; 29 T. L. R.	
605; 57 Sol. Jo. 627; 11 L. G. R. 1162	454
Drake <i>v.</i> Bedfordshire County Council, [1944] K. B. 620;	
[1944] 1 All E. R. 633; 113 L. J. K. B. 328; 170 L. T.	
351; 108 J. P. 237; 60 T. L. R. 304; 88 Sol. Jo. 239;	
42 L. G. R. 188	447, 456
Duncomb's Case (1634), Cro. Car. 366; 1 Roll. Abr. 390	582

E

Eccles <i>v.</i> Wirral Rural Sanitary Authority (1886), 17 Q. B. D.	
107; 55 L. J. M. C. 106; 50 J. P. 596; 34 W. R. 412;	
2 T. L. R. 416	424
Edinburgh Street Tramways Co. <i>v.</i> Edinburgh Corporation,	
[1894] A. C. 456; 63 L. J. Q. B. 769; 71 L. T. 301; 10	
T. L. R. 625; 6 R. 317	762
Entick <i>v.</i> Carrington (1765), 19 St. Tr. 1029; 2 Wils. 275	406
Errington <i>v.</i> Minister of Health, [1935] 1 K. B. 249; 104	
L. J. K. B. 49; 152 L. T. 154; 99 J. P. 15; 51 T. L. R.	
44; 78 Sol. Jo. 754; 32 L. G. R. 481	334, 418, 421, 422,
	525, 526
Estate and Trust Agencies (1927), Ltd. <i>v.</i> Singapore Improve-	
ment Trust, [1937] A. C. 898; [1937] 3 All E. R. 324; 106	
L. J. P. C. 152; 157 L. T. 358; 53 T. L. R. 829; 81	
Sol. Jo. 783	436
Evans <i>v.</i> Liverpool Corporation, [1906] 1 K. B. 160; 74	
L. J. K. B. 742; 69 J. P. 263; 21 T. L. R. 558; 3 L. G. R.	
868	439

F

FALCONER <i>v.</i> Stearn, [1932] 1 Ch. 509; 101 L. J. Ch. 231;	
146 L. T. 461; 30 L. G. R. 187	327, 709

Falmouth Clearance Order, 1936, <i>Re</i> , Halse's Application, [1937]	
3 All E. R. 308; 157 L. T. 140; 101 J. P. 490; 53 T. L. R.	
853; 81 Sol. Jo. 590; 35 L. G. R. 421 ...	334, 418, 436, 524, 526, 527
Feather <i>v.</i> R. (1865), 6 B. & S. 257; 35 L. J. Q. B. 200; 12	
L. T. 114; 29 J. P. 709 ...	372
Fenwick <i>v.</i> Croydon Rural Sanitary Authority, [1891] 2 Q. B.	
216; 60 L. J. M. C. 161; 65 L. T. 645; 55 J. P. 470; 40	
W. R. 124; 7 T. L. R. 594 ...	597
Ferguson <i>v.</i> Lord Kinnoull (1842), 9 Cl. & Fin. 251; 4 St. Tr.	
N. S. 785 ...	390
Ferrand <i>v.</i> Bingley Urban Council, [1903] 2 K. B. 445; 72	
L. J. K. B. 734; 89 L. T. 333; 67 J. P. 370; 52 W. R.	
77; 19 T. L. R. 592; 47 Sol. Jo. 691; 1 L. G. R.	
845 ...	582
Field <i>v.</i> Borough of Poplar, [1929] 1 K. B. 750; 98 L. J. K. B.	
575; 140 L. T. 691; 93 J. P. 157; 45 T. L. R. 333; 73	
Sol. Jo. 158; 27 L. G. R. 370 ...	126
Finchley Electric Light Co. <i>v.</i> Finchley Urban Council, [1903]	
1 Ch. 437; 72 L. J. Ch. 297; 88 L. T. 215; 67 J. P. 97;	
51 W. R. 375; 19 T. L. R. 238; 47 Sol. Jo. 297 ...	573
Fisher <i>v.</i> Oldham Corporation, [1930] 2 K. B. 364; 99 L. J. K. B.	
569; 143 L. T. 281; 94 J. P. 132; 46 T. L. R. 390;	
74 Sol. Jo. 299; 28 L. G. R. 293; 29 Cox C. C.	
154 ...	440, 650
— <i>v.</i> Prowse (1862), 2 B. & S. 770; 31 L. J. Q. B. 212; 6	
L. T. 711; 26 J. P. 613; 8 Jur. N. S. 1208 ...	571
— <i>v.</i> Ruislip-Northwood Urban District Council and	
Middlesex County Council, [1945] K. B. 584; 2 All E. R.	
458; 173 L. T. 261; 110 J. P. 1; 61 T. L. R. 1; 89 Sol.	
Jo. 434; 43 L. G. R. 224 ...	444
Fishmongers' Co. <i>v.</i> Robertson (1843), 5 Man. & Gr. 131; 6	
Scott N. P. 56 ...	453
Fletcher <i>v.</i> Ilkeston Corporation (1931), 96 J. P. 7; 48 T. L. R.	
44; 30 L. G. R. 6 ...	399, 523
Folkestone Corporation <i>v.</i> Brockman, [1914] A. C. 338; 83	
L. J. K. B. 745; 110 L. T. 834; 78 J. P. 273; 30 T. L. R.	
297; 12 L. G. R. 334 ...	576
Forsey & Hollebone's Contract, <i>Re</i> , [1927] 2 Ch. 379; 97	
L. J. Ch. 4; 138 L. T. 26; 91 J. P. 182; 71 Sol. Jo. 823;	
25 L. G. R. 442 ...	557
Fredman <i>v.</i> Minister of Health (1935), 154 L. T. 240; 100 J. P.	
104; 80 Sol. Jo. 56; 34 L. G. R. 153 ...	418, 524
Freeborn <i>v.</i> Leeming, [1926] 1 K. B. 160; 95 L. J. K. B. 114;	
134 L. T. 117; 90 J. P. 53; 42 T. L. R. 119; 70 Sol. Jo.	
264; 24 L. G. R. 9 ...	460
Frost <i>v.</i> Minister of Health, [1935] 1 K. B. 286; 104 L. J. K. B.	
218; 152 L. T. 330; 99 J. P. 87; 51 T. L. R. 171; 33	
L. G. R. 20 ...	334, 335, 418, 422, 525, 526

G

	PAGE
GALLSWORTHY <i>v.</i> Selby Dam Drainage Commissioners, See <i>R. v. Selby Dam Drainage Commissioners.</i>	
Gateshead Guardians <i>v.</i> Durham County Council, [1918] 1 Ch. 146; 87 L. J. Ch. 113; 117 L. T. 796; 82 J. P. 53; 34 T. L. R. 65; 62 Sol. Jo. 86; 16 L. G. R. 33	702
Geddis <i>v.</i> Bann Reservoir Proprietors (1878), 3 App. Cas. 430	442
Gentel <i>v.</i> Rapps, [1902] 1 K. B. 160; 71 L. J. K. B. 105; 85 L. T. 683; 66 J. P. 117; 50 W. R. 216; 18 T. L. R. 72; 46 Sol. Jo. 69; 20 Cox C. C. 104	222
George <i>v.</i> Thomas, [1910] 2 K. B. 951; 80 L. J. K. B. 7; 103 L. T. 456; 74 J. P. 398; 8 L. G. R. 849	251
Gidley <i>v.</i> Lord Palmerston (1822), 3 Brod. & B. 275; 1 St. Tr. N. S. 1263; 7 Moore C. P. 91	372
Gilleghan <i>v.</i> Minister of Health, [1932] 1 Ch. 86; 101 L. J. Ch. 81; 146 L. T. 231; 47 T. L. R. 439	373
Glamorgan County Council <i>v.</i> Ayton, [1936] 3 All E. R. 210; 155 L. T. 509; 100 J. P. 483; 53 T. L. R. 35; 80 Sol. Jo. 877; 34 L. G. R. 549	239
<i>v.</i> Birmingham Corporation, [1933] 1 K. B. 198; 102 L. J. K. B. 6; 148 L. T. 16; 96 J. P. 409; 48 T. L. R. 664; 30 L. G. R. 426	692
Glasbrook Bros., Ltd. <i>v.</i> Glamorgan County Council, [1925] A. C. 270; 94 L. J. K. B. 272; 132 L. T. 611; 89 J. P. 29; 41 T. L. R. 213; 69 Sol. Jo. 212; 23 L. G. R. 61	660
Glasgow Insurance Committee <i>v.</i> Scottish Insurance Com- missioners, [1915] S. C. 504; 52 Sc. L. R. 378; [1915] 1 S. L. T. 217	330
Glossop <i>v.</i> Heston & Isleworth Local Board (1879), 12 Ch. D. 102; 49 L. J. Ch. 89; 40 L. T. 736; 44 J. P. 36; 28 W. R. 111	392, 446
Gold <i>v.</i> Essex County Council, [1942] 2 K. B. 293; [1942] 2 All E. R. 237; 167 L. T. 166; 106 J. P. 242; 58 T. L. R. 357; 86 Sol. Jo. 295; 40 L. G. R. 249	439
Goodtitle d. Chester <i>v.</i> Alker and Elmes (1757), 1 Burr. 133; 1 Keny. 427	571
Government of Ireland Act, 1920, <i>Re</i> A Reference under the, [1936] A. C. 352; [1936] 2 All E. R. 111; 105 L. J. P. C. 81; 154 L. T. 614; 52 T. L. R. 388; 80 Sol. Jo. 404	154, 170
Graigola Merthyr Co. <i>v.</i> Swansea Corporation, [1929] A. C. 344; 98 L. J. Ch. 233; 140 L. T. 505; 93 J. P. 121; 45 T. L. R. 219; 73 Sol. Jo. 109; 27 L. G. R. 243	458
Green <i>v.</i> Matthews & Co. (1930), 46 T. L. R. 206	622
Greenwich Housing Order, 1936, <i>Re</i> , Willey's Application, [1937] 3 All E. R. 305; 157 L. T. 67; 101 J. P. 495; 53 T. L. R. 839; 81 Sol. Jo. 501; 35 L. G. R. 416	525

	PAGE
Greenwood v. Atherton, [1938] 2 All E. R. 475; affirmed, [1939], 1 K. B. 388; [1938] 4 All E. R. 686; 108 L. J. K. B. 165; 160 L. T. 37; 103 J. P. 41; 55 T. L. R. 222; 82 Sol. Jo. 1049; 37 L. G. R. 97, C. A. ...	456
Grose v. West (1816), 7 Taunt. 39 ...	572
Groves v. Lord Wimborne, [1898] 2 Q. B. 402; 67 L. J. Q. B. 862; 79 L. T. 284; 47 W. R. 87; 14 T. L. R. 493; 42 Sol. Jo. 633 ...	444

H

HAMMERSMITH CLEARANCE ORDER, 1936, <i>Re</i> , Wilmot's Application, [1937] 3 All E. R. 539; 157 L. T. 142; 81 Sol. Jo. 751; 35 L. G. R. 482 ...	334, 526
Hammersmith, etc. Railway Co. v. Brand (1869), L. R. 4 H. L. 171; 38 L. J. Q. B. 265; 21 L. T. 238; 34 J. P. 36; 18 W. R. 12 ...	442
Hann, <i>In re. Ex parte</i> Foreman (1887), 18 Q. B. D. 393; 56 L. J. Q. B. 161; 35 W. R. 370; 4 Morr. 16 ...	328
Harrington (Earl of) v. Derby Corporation, [1905] 1 Ch. 205; 74 L. J. Ch. 219; 92 L. T. 153; 69 J. P. 62; 21 T. L. R. 98; 3 L. G. R. 321 ...	461
Harrison v. Duke of Rutland, [1893] 1 Q. B. 142; 62 L. J. Q. B. 117; 68 L. T. 35; 57 J. P. 278; 41 W. R. 322; 9 T. L. R. 115; 4 R. 155 ...	572
Hawkes v. Torquay Corporation, [1938] 4 All E. R. 16; 61 Ll. L. Rep. 289 ...	457
Hickman v. Maisey, [1900] 1 Q. B. 752; 69 L. J. Q. B. 511; 82 L. T. 321; 48 W. R. 385; 16 T. L. R. 274; 44 Sol. Jo. 326 ...	572
Hill v. Aldershot Corporation, [1933] 1 K. B. 259; 102 L. J. K. B. 179; 148 L. T. 173; 96 J. P. 493; 31 L. G. R. 1 ...	504
Horn v. Minister of Health, [1937] 1 K. B. 164; [1936] 2 All E. R. 1299; 105 L. J. K. B. 649; 155 L. T. 335; 100 J. P. 463; 80 Sol. Jo. 688; 34 L. G. R. 495 ...	421, 422, 525
Hornchurch Urban District Council v. Webber, [1938] 1 K. B. 698; [1938] 1 All E. R. 309; 107 L. J. K. B. 438; 158 L. T. 258; 102 J. P. 167; 54 T. L. R. 358; 82 Sol. Jo. 157; 36 L. G. R. 262 ...	398, 600
Houldsworth v. City of Glasgow Bank (1880), 5 App. Cas. 317; 42 L. T. 194; 28 W. R. 677 ...	438
Hurle-Hobbs, <i>Re</i> , [1944] 1 All E. R. 249; <i>sub nom.</i> Surridge v. Hurle-Hobbs, [1944] 2 All E. R. 261; 108 J. P. 200; 42 L. G. R. 118; on appeal <i>sub nom.</i> <i>Re</i> Hurle-Hobbs, 42 L. G. R. 285, C. A. ...	203
Huyton & Roby Gas Co. v. Liverpool Corporation, [1926] 1 K. B. 146; 95 L. J. K. B. 269; 134 L. T. 203; 90 J. P. 45; 42 T. L. R. 116; 70 Sol. Jo. 226; 24 L. G. R. 1 ...	460

I

INSTITUTE OF PATENT AGENTS <i>v.</i> Lockwood, [1894] A. C. 347;	PAGE
63 L. J. P. C. 75; 71 L. T. 205; 10 T. L. R. 527; 6 R.	
219	328, 329

J

JACOBS <i>v.</i> London County Council, [1935] 1 K. B. 67; 104	
L. J. K. B. 84; 152 L. T. 78; 99 J. P. 10; 51 T. L. R.	
16; 78 Sol. Jo. 734; 32 L. G. R. 409	460
Jenkin <i>v.</i> Pharmaceutical Society of Great Britain, [1921] 1 Ch.	
392; 90 L. J. Ch. 47; 124 L. T. 309; 37 T. L. R. 54;	
65 Sol. Jo. 116	285
Johnstone <i>v.</i> Pedlar, [1921] 2 A. C. 262; 90 L. J. P. C. 181;	
125 L. T. 809; 37 T. L. R. 870; 65 Sol. Jo. 679; 27	
Cox C. C. 68	406
Jones <i>v.</i> Bates, [1938] 2 All E. R. 237; 158 L. T. 507; 102	
J. P. 291; 54 T. L. R. 648; 82 Sol. Jo. 314; 36 L. G. R.	
227	577, 578
Jones and Jones <i>v.</i> Nelson, [1938] 2 All E. R. 171	520

K

KENT COUNTY COUNCIL AND DOVER COUNCIL, <i>Ex parte</i> , [1891]	
1 Q. B. 389; 60 L. J. Q. B. 314; 64 L. T. 421; 55 J. P.	
248; 7 T. L. R. 250	248
Kingston Union <i>v.</i> Metropolitan Water Board, [1926] A. C. 331;	
95 L. J. K. B. 605; 134 L. T. 483; 90 J. P. 69; 42 T. L. R.	
275; 24 L. G. R. 105	155
Kirkheaton Local Board <i>v.</i> Ainley, Sons & Co., [1892] 2 Q. B.	
274; 61 L. J. Q. B. 812; 67 L. T. 209; 57 J. P. 36; 41	
W. R. 99; 8 T. L. R. 663; 36 Sol. Jo. 608	624
Kruse <i>v.</i> Johnson, [1898] 2 Q. B. 91; 67 L. J. Q. B. 782; 78	
L. T. 647; 62 J. P. 469; 46 W. R. 630; 14 T. L. R.	
416; 42 Sol. Jo. 509; 19 Cox C. C. 103	214, 222

L

LADIES HOSIERY & UNDERWEAR, LTD. <i>v.</i> West Middlesex	
Assessment Committee, [1932] 2 K. B. 679; 101 L. J. K. B.	
632; 147 L. T. 390; 96 J. P. 336; 30 L. G. R. 369	159
Lancaster County Council <i>v.</i> Crowe, [1929] 1 K. B. 587; 98	
L. J. K. B. 353; 140 L. T. 554; 93 J. P. 38; 45 T. L. R.	
170; 73 Sol. Jo. 13; 27 L. G. R. 96	711
Lane <i>v.</i> Cox, [1897] 1 Q. B. 415; 66 L. J. Q. B. 193; 76 L. T.	
135; 45 W. R. 261; 13 T. L. R. 142; 41 Sol. Jo. 142	520

	PAGE
Lapish <i>v.</i> Braithwaite, [1926] A. C. 275; 95 L. J. K. B. 406; 134 L. T. 481; 90 J. P. 65; 42 T. L. R. 263; 70 Sol. Jo. 365; 24 L. G. R. 125	101, 122
Lawford <i>v.</i> Billericay Rural Council, [1903] 1 K. B. 772; 72 L. J. K. B. 554; 88 L. T. 317; 67 J. P. 245; 51 W. R. 630; 19 T. L. R. 322; 47 Sol. Jo. 366; 1 L. G. R. 535	453
Lawson <i>v.</i> Reynolds, [1904] 1 Ch. 718; 73 L. J. Ch. 451; 90 L. T. 278; 68 J. P. 254; 52 W. R. 375; 20 T. L. R. 293; 2 L. G. R. 749	251
Lee <i>v.</i> Bude, etc., Railway Co. (1871), L. R. 6 C. P. 576; 24 L. T. 827; 19 W. R. 954	318
Leeds Corporation <i>v.</i> Jenkinson, [1935] 1 K. B. 168; 104 L. J. K. B. 182; 152 L. T. 126; 98 J. P. 447; 51 T. L. R. 19; 78 Sol. Jo. 734; 32 L. G. R. 416	540
——— <i>v.</i> Ryder. See <i>R. v. Woodhouse</i> , etc.	
Leeson <i>v.</i> General Medical Council (1889), 43 Ch. D. 366; 59 L. J. Ch. 233; 61 L. T. 849; 38 W. R. 303	422
Legge (George) & Son, Ltd. <i>v.</i> Wenlock Corporation, [1938] A. C. 204; [1938] 1 All E. R. 37; 107 L. J. Ch. 72; 158 L. T. 265; 102 J. P. 93; 54 T. L. R. 315; 82 Sol. Jo. 133; 36 L. G. R. 117	623
Lewis <i>v.</i> Cattle, [1938] 2 K. B. 454; [1938] 2 All E. R. 368; 107 L. J. K. B. 429; 159 L. T. 166; 102 J. P. 239; 54 T. L. R. 721; 82 Sol. Jo. 376; 36 L. G. R. 290; 31 Cox, C. C. 123	650
Lewys <i>v.</i> Beccles Corporation. See <i>Lewys v. Burnett</i> .	
——— <i>v.</i> Burnett and Dunbar, [1945] 2 All E. R. 555; 172 L. T. 307; 61 T. L. R. 527; 89 Sol. Jo. 415; 43 L. G. R. 186; <i>sub nom.</i> <i>Lewys v. Beccles Corporation & Others</i> , 109 J. P. 253	447
Lincoln (Mayor of) <i>v.</i> Holmes Common (1867), L. R. 2 Q. B. 482; 8 B. & S. 344; 36 L. J. M. C. 73; 16 L. T. 739; 31 J. P. 645; 15 W. R. 786	237
Lindsey County Council <i>v.</i> Marshall, [1937] A. C. 97; [1938] 2 All E. R. 1076; 105 L. J. K. B. 614; 155 L. T. 297; 100 J. P. 411; 52 T. L. R. 661; 80 Sol. Jo. 702; 34 L. G. R. 469	439
Liverpool Corporation <i>v.</i> Hope, [1938] 1 K. B. 751; [1938] 1 All E. R. 492; 107 L. J. K. B. 694; 158 L. T. 215; 102 J. P. 205; 54 T. L. R. 425; 82 Sol. Jo. 194; 36 L. G. R. 183	169
——— <i>v.</i> Lancashire County Council, [1937] Ch. 190; [1936] 3 All E. R. 945; 106 L. J. Ch. 113; 156 L. T. 68; 101 J. P. 107; 53 T. L. R. 164; 80 Sol. Jo. 1012; 35 L. G. R. 123	178, 179
Local Government Board <i>v.</i> Arlidge, [1915] A. C. 120; 84 L. J. K. B. 72; 111 L. T. 905; 79 J. P. 97; 30 T. L. R. 672; 12 L. G. R. 1109	425, 434

Lockwood's Case. See Patent Agents Institute v. Lockwood.	
London and North Eastern Railway Co. v. North Riding of Yorkshire County Council, [1936] A. C. 365; [1936] 1 All E. R. 692; 105 L. J. Ch. 133; 154 L. T. 409; 52 T. L. R. 260; 80 Sol. Jo. 423	616
London (City of) v. Wood (1701), 12 Mod. Rep. 669; Holt, K. B. 396; 1 Salk. 397	214
London County Council v. A.-G., [1902] A. C. 165; 71 L. J. Ch. 268; 86 L. T. 161; 66 J. P. 340; 50 W. R. 497; 18 T. L. R. 298	286, 381, 762
----- v. Betts, [1936] 1 K. B. 430; [1936] 1 All E. R. 144; 105 L. J. K. B. 289; 154 L. T. 267; 100 J. P. 183; 52 T. L. R. 257; 80 Sol. Jo. 187; 34 L. G. R. 169; 30 Cox, C. C. 345	680
----- v. Brith Parish & Dartford Union Assessment Committee, [1893] A. C. 562; 63 L. J. M. C. 9; 69 L. T. 725; 57 J. P. 821; 42 W. R. 330; 10 T. L. R. 1; 6 R. 22; Ryde Rat. App. (1891-3) 382	155
London Street Tramways Co. v. London County Council, [1894] A. C. 489; 10 T. L. R. 630	762
Ludlow (Mayor of) v. Charlton (1840), 6 M. & W. 815; 10 L. J. Ex. 75; 4 Jur. 657	283, 450
Lyles v. Southend-on-Sea Corporation, [1905] 2 K. B. 1; 74 L. J. K. B. 484; 92 L. T. 586; 69 J. P. 193; 21 T. L. R. 389; 3 L. G. R. 691	457

M

MACKENZIE-KENNEDY v. The Air Council, [1927] 2 K. B. 517; 96 L. J. K. B. 1145; 138 L. T. 8; 43 T. L. R. 733; 71 Sol. Jo. 633	373
Maclean v. The Workers' Union, [1929] 1 Ch. 602; 98 L. J. Ch. 293; 141 L. T. 83; 45 T. L. R. 256; 73 Sol. Jo. 190	418, 420
McManus v. Bowes, [1938] 1 K. B. 98; [1937] 3 All E. R. 227; 107 L. J. K. B. 51; 157 L. T. 385; 101 J. P. 455; 53 T. L. R. 844; 81 Sol. Jo. 497; 35 L. G. R. 539	125, 457
Magrath, Re, [1934] 2 K. B. 415; 103 L. J. K. B. 660; 151 L. T. 553; 50 T. L. R. 518; 78 Sol. Jo. 586; 32 L. G. R. 380	124, 139, 203, 205, 207
Manchester City (Ringway Airport) Compulsory Purchase Order, 1934, Re, (1935), 153 L. T. 219; 99 J. P. 319; 79 Sol. Jo. 503; 33 L. G. R. 314	334
Manchester Corporation v. Farnworth, [1930] A. C. 171; 99 L. J. K. B. 83; 142 L. T. 145; 94 J. P. 62; 46 T. L. R. 85; 73 Sol. Jo. 818; 27 L. G. R. 709	442

Table of Cases

liii

PAGE

Maritime Electric Co., Ltd. v. General Dairies, Ltd., [1937]	
A. C. 610; [1937] 1 All E. R. 748; 106 L. J. P. C. 81; 156	
L. T. 444; 53 T. L. R. 391; 81 Sol. Jo. 156 ...	449
Marriott v. East Grinstead Gas and Water Co., [1909] 1 Ch. 70;	
78 L. J. Ch. 141; 99 L. T. 958; 72 J. P. 509; 25	
T. L. R. 59; 7 L. G. R. 477 ...	572
— v. Minister of Health, [1937] 1 K. B. 128; [1936] 2 All	
E. R. 865; 106 L. J. K. B. 149; 155 L. T. 94; 100 J. P.	
432; 52 T. L. R. 643; 80 Sol. Jo. 533; 34 L. G. R. 401 ...	334, 526
Marshall v. Blackpool Corporation, [1935] A. C. 16; 103	
L. J. K. B. 566; 151 L. T. 286; 98 J. P. 376; 50 T. L. R.	
483; 78 Sol. Jo. 488; 32 L. G. R. 329 ...	419, 574
Melksham Urban District Council v. Wiltshire County Council,	
[1937] 4 All E. R. 142; 102 J. P. 38; 35 L. G. R. 632 ...	605
Mersey Docks & Harbour Board Trustees v. Gibbs (1866), L. R.	
1 H. L. 93; 11 H. L. C. 686; 35 L. J. Ex. 225; 14 L. T.	
677; 30 J. P. 467; 12 Jur. N. S. 571; 14 W. R. 872; 2	
Mar. L. C. 353 ...	374, 437, 455
Merstham Manor, Ltd. v. Coulsdon and Purley Urban District	
Council, [1937] 2 K. B. 77; [1936] 2 All E. R. 422; 106	
L. J. K. B. 603; 100 J. P. 381; 52 T. L. R. 516; 80 Sol.	
Jo. 615; 34 L. G. R. 356 ...	577
Metropolitan Asylum District v. Hill (1881), 6 App. Cas. 193; 50	
L. J. Q. B. 353; 44 L. T. 653; 45 J. P. 664; 29 W. R. 617	442
Middlesex County Valuation Committee v. West Middlesex	
Assessment Committee, [1937] Ch. 361; [1937] 1 All E. R.	
403; 106 L. J. Ch. 215; 156 L. T. 252; 101 J. P. 203;	
53 T. L. R. 365; 81 Sol. Jo. 157; 35 L. G. R. 211 ...	162
Midland Railway Co. v. Watton (1886), 17 Q. B. D. 30; 55	
L. J. M. C. 99; 54 L. T. 482; 50 J. P. 405; 34 W. R. 524	597
Mills v. London County Council, [1925] 1 K. B. 213; 94	
L. J. K. B. 216; 132 L. T. 386; 89 J. P. 6; 41 T. L. R.	
122; 69 Sol. Jo. 254; 23 L. G. R. 43; 27 Cox C. C. 720	780
Minister of Health v. R. (on the Prosecution of Yaffé). See	
R. v. Minister of Health, <i>Ex parte Yaffé</i> .	
Minister of Supply v. British Thomson-Houston Company,	
Ltd., [1943] K. B. 478; [1943] 1 All E. R. 615; 112	
L. J. K. B. 520; 168 L. T. 389; 59 T. L. R. 242; 87 Sol.	
Jo. 229 ...	373
Moon v. London County Council, [1931] A. C. 151; 100 L. J.	
K. B. 153; 144 L. T. 410; 95 J. P. 64; 47 T. L. R. 154;	
29 L. G. R. 131 ...	157
Morgan v. Liverpool Corporation, [1927] 2 K. B. 131; 96	
L. J. K. B. 234; 136 L. T. 622; 91 J. P. 26; 43 T. L. R.	
146; 71 Sol. Jo. 35; 25 L. G. R. 79 ...	521
Morley, <i>Re</i> (1875), L. R. 20 Eq. 17; 32 L. T. 524; 23 W. R. 532	313
Morrison v. Sheffield Corporation, [1917] 2 K. B. 866; 86 L. J.	
K. B. 1456; 117 L. T. 520; 81 J. P. 277; 33 T. L. R.	
492; 61 Sol. Jo. 611; 15 L. G. R. 667 ...	444

N

	PAGE
NASH <i>v.</i> Finlay (1901), 85 L. T. 682; 66 J. P. 183; 18 T. L. R. 92; 20 Cox C. C. 101	221
Newcastle (Duke of) <i>v.</i> Worksop Urban District Council, [1902] 2 Ch. 145; 71 L. J. Ch. 487; 86 L. T. 405; 18 T. L. R. 472	745
Newcastle-upon-Tyne Corporation <i>v.</i> A.-G., [1892] A. C. 568; 62 L. J. Q. B. 72; 67 L. T. 728; 56 J. P. 836; 1 R. 31	288, 291
Newhill Compulsory Purchase Order, 1937, <i>Re.</i> Payne's Application, [1938] 2 All E. R. 163; 158 L. T. 523; 36 L. G. R. 280	334, 526
Newsome <i>v.</i> Darton Urban District Council, [1938] 2 All E. R. 93; 54 T. L. R. 945	447
North Bucks Furniture Depositories, Ltd., [1939] Ch. 690; [1939] 2 All E. R. 549; 108 L. J. Ch. 275; 160 L. T. 523; 103 J. P. 207; 55 T. L. R. 694; 83 Sol. Jo. 359; 37 L. G. R. 371; [1938-9] B. & C. R. 122	169
North Charterland Exploration Co. (1910), Ltd. <i>v.</i> R., [1931] 1 Ch. 169; 99 L. J. Ch. 483; 143 L. T. 623; 46 T. L. R. 566	414
North Eastern Railway Co. <i>v.</i> York Union, [1900] 1 Q. B. 733; 69 L. J. Q. B. 376; 82 L. T. 201; 64 J. P. 437; Ryde & K. Rat. App. 230	154

O

O'CONNOR <i>v.</i> Waldron, [1935] A. C. 76; 104 L. J. P. C. 21; 152 L. T. 289; 51 T. L. R. 125; 78 Sol. Jo. 859	370
Offer <i>v.</i> Minister of Health, [1936] 1 K. B. 40; 105 L. J. K. B. 6; 153 L. T. 270; 51 T. L. R. 546; 79 Sol. Jo. 609; 33 L. G. R. 369	422, 525
Oldham <i>v.</i> Sheffield Corporation (1927), 136 L. T. 681; 91 J. P. 69; 43 T. L. R. 222; 25 L. G. R. 94	444
Oxford (Mayor of) <i>v.</i> Crow, [1893] 3 Ch. 535; 69 L. T. 228; 42 W. R. 200; 8 R. 279	450

P

PARKER <i>v.</i> Bournemouth Corporation (1902), 86 L. T. 449; 66 J. P. 440; 18 T. L. R. 372	223
Parr <i>v.</i> A.-G. (1842), 8 Cl. & Fin. 409; 6 Jur. 245	290
Pasmore <i>v.</i> Oswaldtwistle Urban District Council, [1898] A. C. 387; 67 L. J. Q. B. 635; 78 L. T. 569; 62 J. P. 628; 14 T. L. R. 368	391, 422, 445
Patent Agents Institute <i>v.</i> Lockwood, [1894] A. C. 347; 63 L. J. P. C. 75; 71 L. T. 205; 10 T. L. R. 527; 6 R. 219	329
Peebles <i>v.</i> Oswaldtwistle Urban District Council, [1897] 1 Q. B. 625; 66 L. J. Q. B. 392; 76 L. T. 315; 61 J. P. 308; 45 W. R. 454; 13 T. L. R. 297	422

Table of Cases

lv

Pittard <i>v.</i> Oliver, [1891] 1 Q. B. 474; 60 L. J. Q. B. 219; 64 L. T. 758; 55 J. P. 100; 39 W. R. 311; 7 T. L. R. 188 ...	130
Polkinghorn <i>v.</i> Lambeth Borough Council, [1938] 1 All E. R. 339; 158 L. T. 127; 102 J. P. 131; 54 T. L. R. 345; 82 Sol. Jo. 94; 36 L. G. R. 130 ...	447
Pratt <i>v.</i> North West Norfolk Assessment Committee and Norfolk County Valuation Committee, [1945] 2 All E. R. 78; 114 L. J. K. B. 321; reversed, [1946] K. B. 93; [1946] 1 All E. R. 4; 174 L. T. 3; 62 T. L. R. 86; 89 Sol. Jo. 590; 44 L. G. R. 33 ...	160
Price's Patent Candle Co., Ltd. <i>v.</i> London County Council, [1908] 2 Ch. 526; 78 L. J. Ch. 1; 99 L. T. 571; 72 J. P. 429; 24 T. L. R. 823; 7 L. G. R. 84 ...	441
Pritchard <i>v.</i> Mayor, etc., of Bangor (1888), 13 App. Cas. 241; 57 L. J. Q. B. 313; 58 L. T. 502; 52 J. P. 564; 37 W. R. 103 ...	110

R

R. <i>v.</i> Assessment Committee of St. Mary Abbots, Kensington, [1891] 1 Q. B. 378; 60 L. J. M. C. 52; 64 L. T. 240; 55 J. P. 502; 39 W. R. 278; 7 T. L. R. 248; Ryde, Rat. App. (1891-3) 276 ...	161
— <i>v.</i> Barnstaple Justices. <i>Ex parte</i> Carder, [1938] 1 K. B. 385; [1937] 4 All E. R. 263; 107 L. J. K. B. 127; 158 L. T. 409; 101 J. P. 547; 54 T. L. R. 36; 81 Sol. Jo. 963; 35 L. G. R. 651 ...	395, 779
— <i>v.</i> Bedwellty Urban District Council. <i>Ex parte</i> Price, [1934] 1 K. B. 333; 103 L. J. K. B. 152; 150 L. T. 180; 98 J. P. 25; 50 T. L. R. 91; 31 L. G. R. 430 ...	202, 391
— <i>v.</i> Beer, [1903] 2 K. B. 693; 72 L. J. K. B. 608; 89 L. T. 412; 67 J. P. 326; 52 W. R. 221; 19 T. L. R. 531; 1 L. G. R. 634; 10 Mans. 263 ...	119, 388
— <i>v.</i> Brightside Bierlow (Inhabitants of) (1849), 13 Q. B. 933; 3 New Mag. Cas. 230; 4 New Sess. Cas. 47; 19 L. J. M. C. 50; 14 L. T. O. S. 103; 13 J. P. 716; 14 Jur. 174 ...	582
— <i>v.</i> Brown (1841), C. & M. 314; 4 St. Tr. N. S. App. 1369 ...	660
— <i>v.</i> Bucks (Inhabitants of) (1810), 12 East 192 ...	610
— <i>v.</i> Cambridgeshire County Council, [1937] 1 K. B. 201; [1936] 3 All E. R. 352; 106 L. J. K. B. 103; 155 L. T. 559; 101 J. P. 1; 53 T. L. R. 84; 80 Sol. Jo. 934; 34 L. G. R. 597 ...	634
— <i>v.</i> Carter (1904), 68 J. P. 466 ...	459
— <i>v.</i> Chart and Longbridge (Inhabitants of) (1870), L. R. 1 C. C. R. 237; 39 L. J. M. C. 107; 22 L. T. 416; 34 J. P. 454; 18 W. R. 791; 11 Cox C. C. 502 ...	613
— <i>v.</i> Commissioners for Special Purposes of Income Tax (1888), 21 Q. B. D. 313; 57 L. J. Q. B. 513; 59 L. T. 455; 53 J. P. 84; 36 W. R. 776; 4 T. L. R. 636; 2 Tax Cas. 332 ...	390

	PAGE
R. v. Commissioners for Special Purposes of Income Tax, [1920] 1 K. B. 26; 89 L. J. K. B. 194; 35 T. L. R. 684; 63 Sol. Jo. 790	390
— v. Commissioners of Inland Revenue. <i>In re</i> Nathan (1884), 12 Q. B. D. 461; 53 L. J. Q. B. 229; 51 L. T. 46; 48 J. P. 452; 32 W. R. 543	389
— v. Dublin Corporation (1878), 2 L. R. Ir. 371	396
— v. Electricity Commissioners, [1924] 1 K. B. 171; 93 L. J. K. B. 390; 130 L. T. 164; 88 J. P. 13; 39 T. L. R. 715; 68 Sol. Jo. 188; 21 L. G. R. 719	327, 331, 393
— v. Glamorganshire County Council. <i>Ex parte</i> Collier, [1936] 2 All E. R. 168; 155 L. T. 31	129
— v. Grain. <i>Ex parte</i> Wandsworth Guardians, [1927] 2 K. B. 205; 96 L. J. K. B. 563; 136 L. T. 776; 91 J. P. 71; 43 T. L. R. 342; 71 Sol. Jo. 308; 25 L. G. R. 231	204
— v. Hall, [1891] 1 Q. B. 747; 60 L. J. M. C. 124; 64 L. T. 394; 17 Cox C. C. 278	384
— v. Hendon Rural District Council. <i>Ex parte</i> Chorley, [1933] 2 K. B. 696; 102 L. J. K. B. 658; 149 L. T. 535; 97 J. P. 210; 49 T. L. R. 482; 31 L. G. R. 332	139, 397, 420
— v. Horsham and Worthington Assessment Committee. <i>Ex parte</i> Burgess, [1937] 2 K. B. 408; [1937] 2 All E. R. 681; 106 L. J. K. B. 810; 157 L. T. 41; 101 J. P. 411; 53 T. L. R. 755; 81 Sol. Jo. 572; 35 L. G. R. 285	160
— v. Hunt (1856), 6 E. & B. 408; 25 L. J. Q. B. 296; 27 L. T. O. S. 124; 20 J. P. 581; 2 Jur. N. S. 1138; 4 W. R. 561	428
— v. Isle of Ely (Inhabitants of) (1850), 15 Q. B. 827; 4 New Mag. Cas. 128; 4 New Sess. Cas. 222; 19 L. J. M. C. 223; 15 L. T. O. S. 412; 14 J. P. 512; 14 Jur. 956; 4 Cox C. C. 281	616
— v. Legislative Committee of the Church Assembly. <i>Ex parte</i> Haynes-Smith, [1928] 1 K. B. 411; 97 L. J. K. B. 222; 138 L. T. 399; 44 T. L. R. 68; 71 Sol. Jo. 947	414
— v. Local Government Board (1882), 10 Q. B. D. 309; 52 L. J. M. C. 4; 48 L. T. 173; 47 J. P. 228; 31 W. R. 72	394, 423
— v. London County Council, [1893] 2 Q. B. 454; 63 L. J. Q. B. 4; 69 L. T. 580; 58 J. P. 21; 42 W. R. 1; 9 T. L. R. 601; 37 Sol. Jo. 669; 4 R. 531	293
— v. ————— (1929), 141 L. T. 590; 45 T. L. R. 512	459
— v. ————— [1931] 2 K. B. 215; 100 L. J. K. B. 760; 144 L. T. 464; 95 J. P. 89; 47 T. L. R. 227; 75 Sol. Jo. 138; 29 L. G. R. 252	397, 414

Table of Cases

lvii

	PAGE
R. v. Lord's Commissioners of the Treasury (1872), L. R. 7 Q. B. 387; 41 L. J. Q. B. 178; 26 L. T. 64; 36 J. P. 661; 20 W. R. 336; 12 Cox C. C. 277	390
— v. Milk Marketing Board. <i>Ex parte</i> North (1934), 50 T. L. R. 559; 78 Sol. Jo. 536	421
— v. Minister of Health. <i>Ex parte</i> Committee of Visitors of the Glamorgan County Mental Hospital, [1938] 1 All E. R. 344; 36 L. G. R. 164; affirmed, [1938] 4 All E. R. 32; 159 L. T. 508; 102 J. P. 497; 55 L. T. R. 4; 82 Sol. Jo. 869	422
— v. ———— <i>Ex parte</i> Davis, [1929] 1 K. B. 619; 98 L. J. K. B. 636; 141 L. T. 6; 93 J. P. 49; 45 T. L. R. 345; 27 L. G. R. 677	414
— v. ———— <i>Ex parte</i> Hack, [1937] 3 All E. R. 176; 157 L. T. 118; 101 J. P. 430; 81 Sol. Jo. 461; 35 L. G. R. 349	527
— v. ———— <i>Ex parte</i> Rush, [1922] 2 K. B. 28; 91 L. J. K. B. 530; 126 L. T. 633; 86 J. P. 51; 38 T. L. R. 264; 66 Sol. Jo. 299; 20 L. G. R. 252	390
— v. ———— <i>Ex parte</i> Villiers, [1936] 2 K. B. 29; [1936] 1 All E. R. 817; 105 L. J. K. B. 792; 154 L. T. 630; 100 J. P. 212; 52 T. L. R. 408; 80 Sol. Jo. 426; 34 L. G. R. 203	415
— v. ———— <i>Ex parte</i> Wortley Rural District Council, [1927] 2 K. B. 229; 97 L. J. K. B. 10; 137 L. T. 279; 91 J. P. 95; 43 T. L. R. 482; 25 L. G. R. 279	428
— v. ———— <i>Ex parte</i> Yaffé, [1930] 2 K. B. 98; 99 L. J. K. B. 457; 143 L. T. 122; 94 J. P. 98; 46 T. L. R. 373; 28 L. G. R. 249; reversed, <i>sub nom.</i> Minister of Health v. R. (on the Prosecution of Yaffé), [1931] A. C. 494; 100 L. J. K. B. 306; 47 T. L. R. 337; 75 Sol. Jo. 232	328, 329, 330
— v. Minister of Transport. <i>Ex parte</i> Upminster Services, Ltd., [1934] 1 K. B. 277; 103 L. J. K. B. 257; 150 L. T. 152; 98 J. P. 81; 50 T. L. R. 60; 32 L. G. R. 61	415
— v. Morton, [1892] 1 Q. B. 39; 61 L. J. Q. B. 39; 65 L. T. 611; 56 J. P. 105; 40 W. R. 109; 8 T. L. R. 50; 36 Sol. Jo. 44	388
— v. North-East Surrey Assessment Committee, <i>Ex parte</i> Woolworth (F. W.) & Co., [1933] 1 K. B. 776; 102 L. J. K. B. 763; 148 L. T. 428; 97 J. P. 46; 31 L. G. R. 119	161, 162, 397, 420

	PAGE
R. v. North Worcestershire Assessment Committee, <i>Ex parte</i> Hadley, [1929] 2 K. B. 397; 98 L. J. K. B. 605; 141 L. T. 557; 93 J. P. 199; 45 T. L. R. 525; 27 L. G. R. 458 ... 161, 397	
— v. Petrie (1855), 4 E. & B. 737; 3 C. L. R. 829; 24 L. J. Q. B. 167; 24 L. T. O. S. 271; 19 J. P. 483; 1 Jur. N. S. 752; 3 W. R. 243; 6 Cox C. C. 512 ... 576	
— v. Pinney (1832), 5 C. & P. 254; 3 B. & Ad. 947; 3 St. Tr. N. S. 11; 1 Nev. & M. M. C. 307 ... 660	
— v. Poole Corporation (1887), 19 Q. B. D. 602; 56 L. J. M. C. 131; 57 L. T. 485; 52 J. P. 84; 36 W. R. 239; 16 Cox C. C. 323 ... 594	
— v. Poplar Borough Council (No. 2), [1922] 1 K. B. 95; 91 L. J. K. B. 174; 126 L. T. 138; 85 J. P. 259; 38 T. L. R. 5; 19 L. G. R. 731 ... 390	
— v. Port of London Authority, [1919] 1 K. B. 176; 88 L. J. K. B. 553; 120 L. T. 177; 83 J. P. 41; 35 T. L. R. 103; 16 L. G. R. 937 ... 459	
— v. Prest (1850), 16 Q. B. 32; 20 L. J. Q. B. 17; 16 L. T. O. S. 210; 15 Jur. 554; 14 J. P. Jo. 750 ... 290	
— v. Rand (1866), L. R. 1 Q. B. 230; 7 B. & S. 297; 35 L. J. M. C. 157; 30 J. P. 293 ... 416	
— v. Roberts, [1908] 1 K. B. 407; 77 L. J. K. B. 281; 98 L. T. 154; 72 J. P. 81; 24 T. L. R. 226; 52 Sol. Jo. 171; 6 L. G. R. 268 ... 206	
— v. St. Benedict, Cambridge (Inhabitants of) (1821), 4 B. & Ald. 447 ... 611	
— v. St. Martin's Guardians (1851), 17 Q. B. 149; 20 L. J. Q. B. 423; 17 L. T. O. S. 140; 15 J. P. 371; 15 Jur. 800 ... 387	
— v. Saintiff (1704), 6 Mod. 255; Holt K. B. 129; 2 Ld. Raym. 1174; 1 Salk. 359 ... 571	
— v. Salford Assessment Committee. <i>Ex parte</i> Ogden, [1937] 2 K. B. 1; [1937] 2 All E. R. 98; 106 L. J. K. B. 344; 156 L. T. 474; 101 J. P. 225; 53 T. L. R. 474; 81 Sol. Jo. 198; 35 L. G. R. 219 ... 397, 416	
— v. Saunders (1854), 3 E. & B. 763; 2 C. L. R. 1689; 24 L. J. M. C. 45; 23 L. T. O. S. 157; 18 J. P. 584; 1 Jur. N. S. 86; 2 W. R. 492 ... 127	
— v. Selby Dam Drainage Commissioners, [1892] 1 Q. B. 348; 61 L. J. Q. B. 372; 66 L. T. 17; 56 J. P. 356; 8 T. L. R. 198 ... 374	
— v. Sheffield Canal Co. (1849), 13 Q. B. 913; 4 New Mag. Cas. 45; 4 New Sess. Cas. 25; 19 L. J. M. C. 44; 14 J. P. 224; 14 Jur. 170 ... 582	
— v. Sheffield (Mayor of) (1871), L. R. 6 Q. B. 652; 40 L. J. Q. B. 247; 24 L. T. 659; 36 J. P. 37, 229; 19 W. R. 1159 ... 297, 298	
— v. Southampton County (Inhabitants of) (1886), 17 Q. B. D. 424; 55 L. J. M. C. 158; 55 L. T. 322; 35 W. R. 10; 50 J. P. 773; 2 T. L. R. 815; 16 Cox C. C. 117 ... 613	

Table of Cases

lix

	PAGE
<i>R. v. Southampton</i> (Inhabitants of County of) (1887), 19 Q. B. D. 590; 56 L. J. M. C. 112; 57 L. T. 261; 52 J. P. 52; 3 T. L. R. 712; 16 Cox. C. C. 271 ...	611
— <i>v. Stamford</i> (Mayor of) (1844), 6 Q. B. 433; 3 L. T. O. S. 281; 9 J. P. 359; 8 Jur. 909 ...	450
— <i>v. Sunderland Justices</i> , [1901] 2 K. B. 357; 70 L. J. K. B. 946; 85 L. T. 183; 65 J. P. 598; 17 T. L. R. 551; 45 Sol. Jo. 575 ...	416
— <i>v. Sussex Justices. Ex parte McCarthy</i> , [1924] 1 K. B. 256; 93 L. J. K. B. 129; 130 L. T. 510; 88 J. P. 3; 40 T. L. R. 80; 68 Sol. Jo. 253; 22 L. G. R. 46; 27 Cox C. C. 590 ...	416
— <i>v. Thompson</i> (1844), 5 Q. B. 477; 13 L. J. Q. B. 177; Dav. & Mer. 497; 2 L. T. O. S. 326; 8 J. P. Jo. 55; 8 Jur. 558 ...	139
— <i>v. Tynemouth Rural District Council</i> , [1896] 2 Q. B. 451; 65 L. J. Q. B. 545; 75 L. T. 86; 60 J. P. 804; 12 T. L. R. 536; 40 Sol. Jo. 667 ...	391
— <i>v. West Monmouthshire Omnibus Board. Ex parte Price</i> , [1938] 1 All E. R. 220; 36 L. G. R. 156 ...	202
— <i>v. West Riding of Yorkshire</i> (Inhabitants of the) (1770), 5 Burr. 2594; 2 Wm. Bl. 685; Lofft. 238 ...	610
— <i>v. ———</i> (Inhabitants of the) (1802), 2 East 342 ...	610
— <i>v. Wilson</i> (1852), 18 Q. B. 348; 21 L. J. Q. B. 281; 19 L. T. O. S. 86; 16 J. P. 567; 16 Jur. 973 ...	596
— <i>v. Wilts</i> (Inhabitants of) (1704), 6 Mod. 307; 1 Salk. 359; 3 Salk. 381; Holt K. B. 339 ...	610
— <i>v. Woodhouse</i> , [1906] 2 K. B. 501; 75 L. J. K. B. 745; 95 L. T. 367; 70 J. P. 485; 22 T. L. R. 603; reversed, <i>sub nom. Leeds Corporation v. Ryder</i> , [1907] A. C. 420; 76 L. J. K. B. 1032; 97 L. T. 261; 71 J. P. 484; 23 T. L. R. 721 ...	395
<i>Railway Assessment Authority v. Southern Railway Co.</i> , [1936] A. C. 266; [1936] 1 All E. R. 26; 105 L. J. K. B. 115; 154 L. T. 314; 100 J. P. 123; 52 T. L. R. 237; 80 Sol. Jo. 223; 34 L. G. R. 103; 24 Ry. & Can. Tr. Cas. 86 ...	155
<i>Raleigh v. Goschen</i> , [1898] 1 Ch. 73; 67 L. J. Ch. 59; 77 L. T. 429; 46 W. R. 90; 14 T. L. R. 36; 42 Sol. Jo. 46 ...	372
<i>Rayner v. Stepney Corporation</i> , [1911] 2 Ch. 312; 80 L. J. Ch. 678; 105 L. T. 362; 75 J. P. 468; 27 T. L. R. 512; 10 L. G. R. 307 ...	415
<i>Reigate</i> (Mayor of) <i>v. Hart</i> (1868), L. R. 3 Q. B. 244; 9 B. & S. 129; 37 L. J. M. C. 70; 18 L. T. 237; 32 J. P. 342; 16 W. R. 896 ...	251
<i>Repton School Governors v. Repton Rural District Council</i> , [1918] 2 K. B. 133; 87 L. J. K. B. 897; 119 L. T. 176; 82 J. P. 257; 34 T. L. R. 407; 16 L. G. R. 569 ...	383

	PAGE
Richards, <i>Ex parte</i> , (1878), 3 Q. B. D. 368; 47 L. J. Q. B. 498; 38 L. T. 684; 42 J. P. 614; 26 W. R. 695 ...	387
——— <i>v. Easto</i> (1846), 15 M. & W. 244; 3 Dow. & L. 515; 15 L. J. Ex. 163; 8 L. T. O. S. 253; 10 Jur. 695 ...	293
Ringer, <i>Ex parte</i> , (1909), 73 J. P. 436; 25 T. L. R. 718; 53 Sol. Jo. 745; 7 L. G. R. 1041 ...	330
Roberts <i>v. Battersea Metropolitan Borough Council</i> (1914), 110 L. T. 566; 78 J. P. 265; 12 L. G. R. 898 ...	459
——— <i>v. Hopwood</i> , [1925] A. C. 578; 94 L. J. K. B. 542; 133 L. T. 289; 89 J. P. 105; 41 T. L. R. 436; 69 Sol. Jo. 475; 23 L. G. R. 337 ...	124, 206
——— <i>v. Hunt</i> (1850), 15 Q. B. 17; 4 New Mag. Cas. 87; 15 L. T. O. S. 66; 14 J. P. 226 ...	596
Robertson <i>v. Bristol Corporation</i> , [1900] 2 Q. B. 198; 69 L. J. Q. B. 590; 82 L. T. 516; 64 J. P. 389; 48 W. R. 498; 16 T. L. R. 359; 44 Sol. Jo. 426 ...	600
Robinson <i>v. Barton-Eccles Local Board</i> (1883), 8 App. Cas. 798; 53 L. J. Ch. 226; 50 L. T. 57; 48 J. P. 276; 32 W. R. 249 ...	597
——— <i>v. Workington Corporation</i> , [1897] 1 Q. B. 619; 66 L. J. Q. B. 388; 75 L. T. 674; 61 J. P. 164; 45 W. R. 453; 13 T. L. R. 148 ...	445, 446
Roper <i>v. Public Works Commissioners</i> , [1915] 1 K. B. 45; 84 L. J. K. B. 219; 111 L. T. 630 ...	373
Royal Aquarium etc. Society <i>v. Parkinson</i> , [1892] 1 Q. B. 431; 61 L. J. Q. B. 409; 66 L. T. 513; 56 J. P. 404; 40 W. R. 450; 8 T. L. R. 352 ...	370
Russell <i>v. Men of Devon</i> (1788), 2 T. R. 667 ...	446

S

SADLER <i>v. Sheffield Corporation</i> , [1924] 1 Ch. 483; 93 L. J. Ch. 209; 131 L. T. 55; 88 J. P. 45; 40 T. L. R. 259; 68 Sol. Jo. 403; 22 L. G. R. 138 ...	713
St. Dunstan's, Stepney, <i>Re</i> , [1937] P. 199; 53 T. L. R. 905 ...	317
St. Mary, Newington, Vestry <i>v. Jacobs</i> (1871), L. R. 7 Q. B. 47; 47 L. J. M. C. 72; 25 L. T. 800; 36 J. P. 119; 20 W. R. 249 ...	572
St. Olave's Union <i>v. Canterbury Union</i> , [1897] 1 Q. B. 682; 66 L. J. Q. B. 471; 76 L. T. 517; 61 J. P. 371; 45 W. R. 529; 41 Sol. Jo. 423 ...	691
Saunders <i>v. Holborn District Board of Works</i> , [1895] 1 Q. B. 64; 64 L. J. Q. B. 101; 71 L. T. 519; 59 J. P. 453; 43 W. R. 26; 11 T. L. R. 5; 39 Sol. Jo. 11; 15 R. 25 ...	445, 447
Scammell (G.) & Nephew, Ltd. <i>v. Hurley</i> , [1929] 1 K. B. 419; 98 L. J. K. B. 98; 140 L. T. 236; 93 J. P. 99; 45 T. L. R. 75; 73 Sol. Jo. 12; 27 L. G. R. 53 ...	458
Sedgwick <i>v. Watney, Combe, Reid & Co., etc.</i> , [1931] A. C. 447; 100 L. J. K. B. 271; 145 L. T. 73; 95 J. P. 115; 47 T. L. R. 308; 29 L. G. R. 279 ...	157

Table of Cases

lxi

	PAGE
Sellors v. Matlock Bath Local Board (1885), 14 Q. B. D. 928 ; 52 L. T. 762	574
Sharp v. Wakefield, [1891] A. C. 173 ; 60 L. J. M. C. 73 ; 64 L. T. 180 ; 55 J. P. 197 ; 39 W. R. 561 ; 7 T. L. R. 389	785
Sharphington v. Fulham Guardians, [1904] 2 Ch. 449 ; 73 L. J. Ch. 777 ; 91 L. T. 739 ; 68 J. P. 510 ; 52 W. R. 617 ; 20 T. L. R. 643 ; 48 Sol. Jo. 620 ; 2 L. G. R. 1229 ...	457
Sheffield (Burgesses) v. Minister of Health (1935), 154 L. T. 183 ; 100 J. P. 99 ; 52 T. L. R. 171 ; 80 Sol. Jo. 16 ; 34 L. G. R. 92	334, 527
Shell Co. of Australia, Ltd. v. Federal Commissioner of Taxation, [1931] A. C. 275 ; 100 L. J. P. C. 55 ; 144 L. T. 421 ...	433
Sheppard v. Glossop Corporation, [1921] 3 K. B. 132 ; 90 L. J. K. B. 994 ; 125 L. T. 520 ; 85 J. P. 205 ; 37 T. L. R. 604 ; 65 Sol. Jo. 472 ; 19 L. G. R. 357	444
Shrewsbury (Earl of) v. Scott (1859), 6 C. B. N. S. 1 ; 29 L. J. C. P. 34 ; 33 L. T. O. S. 368	317
Simeon, Bt. (Sir J. W. B.), Re, [1935] 2 K. B. 183 ; 104 L. J. K. B. 330 ; 152 L. T. 372 ; 99 J. P. 167 ; 51 T. L. R. 235 ; 79 Sol. Jo. 109 ; 33 L. G. R. 75	426, 526
Simpson v. Denison (1852), 10 Hare 51 ; 7 Ry. & Can. Cas. 403 ; 20 L. T. O. S. 46 ; 16 Jur. 828	296
Skilton v. Epsom and Ewell Urban District Council, [1937] 1 K. B. 112 ; [1936] 2 All E. R. 50 ; 106 L. J. K. B. 41 ; 154 L. T. 700 ; 100 J. P. 231 ; 52 T. L. R. 494 ; 80 Sol. Jo. 345 ; 34 L. G. R. 389	447
Smith v. Cartwright (1851), 6 Ex. 927 ; 20 L. J. Ex. 401 ; 17 L. T. O. S. 258 ; 15 J. P. 564	450
— v. Chorley Rural District Council, [1897] 1 Q. B. 532, 678 ; 66 L. J. Q. B. 427 ; 76 L. T. 637 ; 61 J. P. 340 ; 45 W. R. 417 ; 13 T. L. R. 327 ; 41 Sol. Jo. 422 ...	391, 392
— v. Martin & Kingston-upon-Hull Corporation, [1911] 2 K. B. 775 ; 80 L. J. K. B. 1256 ; 105 L. T. 281 ; 75 J. P. 433 ; 27 T. L. R. 468 ; 55 Sol. Jo. 535 ; 9 L. G. R. 780 ...	440
Somerset County Council, <i>Ex parte</i> , (1889), 58 L. J. Q. B. 513 ; 61 L. T. 512 ; 54 J. P. 182 ; 5 T. L. R. 712	139, 648
South of Ireland Colliery Co. v. Waddle (1868), L. R. 3 C. P. 463 ; 37 L. J. C. P. 211 ; 18 L. T. 405 ; 16 W. R. 756	452
Spackman v. Plumstead Board of Works (1885), 10 App. Cas. 229 ; 54 L. J. M. C. 81 ; 53 L. T. 157 ; 49 J. P. 420 ; 33 W. R. 661 ; 1 T. L. R. 313	413
Spencer's Case (1583), 5 Rep. 16a	542
Stanbury v. Exeter Corporation, [1905] 2 K. B. 838 ; 75 L. J. K. B. 28 ; 93 L. T. 795 ; 70 J. P. 11 ; 54 W. R. 247 ; 22 T. L. R. 3 ; 4 L. G. R. 57	439
Standen v. South Essex Recorders, Ltd. (1934), 50 T. L. R. 365 Stillwell v. New Windsor Corporation, [1932] 2 Ch. 155 ; 101 L. J. Ch. 342 ; 147 L. T. 306 ; 76 Sol. Jo. 433 ; 30 L. G. R. 477	130 573

	PAGE
Stockdale <i>v.</i> Hansard (1839), 9 Ad. & El. 1; 3 St. Tr. N. S. 723, 849; 2 Per. & Dav. 1; 8 L. J. Q. B. 294; 3 Jur. 905 ...	327
Stocker <i>v.</i> Minister of Health, [1938] 1 K. B. 655; [1937] 4 All E. R. 678; 107 L. J. K. B. 146; 158 L. T. 29; 102 J. P. 67; 54 T. L. R. 233; 82 Sol. Jo. 96; 36 L. G. R. 92 ...	524, 526, 527
Stockwell <i>v.</i> Southgate Corporation, [1936] 2 All E. R. 1343; on appeal, [1937] 3 All E. R. 627; 155 L. T. 437; 34 L. G. R. 527 ...	581
Stuart <i>v.</i> Haughley Parochial Church Council, [1936] Ch. 32; 104 L. J. Ch. 314; 153 L. T. 311; 51 T. L. R. 538; 79 Sol. Jo. 559 ...	421
Sunderland Corporation <i>v.</i> Priestman, [1927] 2 Ch. 107; 96 L. J. Ch. 441; 137 L. T. 688; 26 L. G. R. 64 ...	449
Sutton's Hospital Case (1612), 10 Rep. 1; Jenk. 270 ...	284
Sydney, Municipal Council of <i>v.</i> Campbell, [1925] A. C. 338; 94 L. J. P. C. 65; 133 L. T. 63 ...	418

T

TENBY CORPORATION <i>v.</i> Mason, [1908] 1 Ch. 457; 77 L. J. Ch. 230; 98 L. T. 349; 72 J. P. 89; 24 T. L. R. 254; 6 L. G. R. 233 ...	129
Thomas <i>v.</i> Devonport Corporation, [1900] 1 Q. B. 16; 69 L. J. Q. B. 51; 81 L. T. 427; 63 J. P. 740; 48 W. R. 89; 16 T. L. R. 9 ...	209
—— <i>v.</i> R. (1874), L. R. 10 Q. B. 31; 44 L. J. Q. B. 9; 31 L. T. 439; 39 J. P. 21; 23 W. R. 176 ...	372
Tilling (T.), Ltd. <i>v.</i> Dick, Kerr & Co., Ltd., [1905] 1 K. B. 562; 74 L. J. K. B. 359; 92 L. T. 731; 69 J. P. 172; 53 W. R. 380; 21 T. L. R. 281; 49 Sol. Jo. 299; 3 L. G. R. 369 ...	456
Tobin <i>v.</i> R. (1864), 16 C. B. N. S. 310; 4 New Rep. 274; 33 L. J. C. P. 199; 10 L. T. 762; 10 Jur. N. S. 1029; 12 W. R. 838; 2 Mar. L. C. 45 ...	372
Toronto Corporation <i>v.</i> York Corporation, [1938] A. C. 415; [1938] 1 All E. R. 601; 107 L. J. P. C. 43; 54 T. L. R. 386; 82 Sol. Jo. 212 ...	433
Tozeland <i>v.</i> West Ham Union, [1907] 1 K. B. 920; 76 L. J. K. B. 514; 96 L. T. 519; 71 J. P. 194; 23 T. L. R. 325; 5 L. G. R. 507 ...	440
Tuckwood <i>v.</i> Rotherham Corporation, [1921] 1 K. B. 526; 90 L. J. K. B. 341; 124 L. T. 522; 85 J. P. 101; 19 L. G. R. 69; 13 B. W. C. C. 327 ...	459
Tulk <i>v.</i> Moxhay (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L. J. Ch. 83; 13 L. T. O. S. 21; 13 Jur. 89 ...	542
Tunbridge Wells Corporation <i>v.</i> Baird, [1896] A. C. 434; 65 L. J. Q. B. 451; 74 L. T. 385; 60 J. P. 788; 12 T. L. R. 372 ...	510, 573

V

	PAGE
VEASEY <i>v.</i> Beardsley & Son, Ltd. (1924), 23 L. G. R. 118 ...	161
Venn <i>v.</i> Tedesco, [1926] 2 K. B. 227; 95 L. J. K. B. 866; 135 L. T. 108; 90 J. P. 185; 42 T. L. R. 478; 70 Sol. Jo. 709; 24 L. G. R. 496	460

W

WALKER'S DECISION, <i>Re</i> , [1944] K. B. 644; [1944] 1 All E. R. 614; 108 J. P. 215; 60 T. L. R. 447; 42 L. G. R. 220 ...	207
Walthamstow Urban District Council <i>v.</i> Sandell (1904), 68 J. P. 509; 2 L. G. R. 835	597
Wells <i>v.</i> Kingston-upon-Hull Corporation (1875), L. R. 10 C. P. 402; 44 L. J. C. P. 257; 32 L. T. 615; 23 W. R. 562	452, 453
Wenlock (Baroness) <i>v.</i> River Dee Commissioners (1883), 36 Ch. D. 675 <i>n.</i> ; 57 L. T. 402 <i>n.</i>	284
_____ <i>v.</i> _____ (1885), 10 App. Cas. 354; 54 L. J. Q. B. 577; 53 L. T. 62; 49 J. P. 773; 1 T. L. R. 477	284
West Hartlepool Corporation <i>v.</i> Durham County Council, [1907] A. C. 246; 76 L. J. K. B. 859; 97 L. T. 114; 71 J. P. 385; 23 T. L. R. 576; 51 Sol. Jo. 550; 5 L. G. R. 854 ...	85
Westminster Corporation <i>v.</i> London and North Western Railway Co., [1905] A. C. 426; 74 L. J. Ch. 629; 93 L. T. 143; 69 J. P. 425; 54 W. R. 129; 21 T. L. R. 886; 3 L. G. R. 1120	413
_____ <i>v.</i> Southern Railway Co., [1936] A. C. 511; [1936] 2 All E. R. 322; 105 L. J. K. B. 537; 155 L. T. 33; 100 J. P. 327; 52 T. L. R. 541; 80 Sol. Jo. 671; 34 L. G. R. 313; 24 Ry. & Can. Tr. Cas. 189 ...	155
Williams <i>v.</i> Mersey Docks and Harbour Board, [1905] 1 K. B. 804; 74 L. J. K. B. 481; 92 L. T. 444; 69 J. P. 196; 53 W. R. 488; 21 T. L. R. 397; 49 Sol. Jo. 417; 3 L. G. R. 529	460
Williams-Ellis <i>v.</i> Cobb, [1935] 1 K. B. 310; 104 L. J. K. B. 109; 152 L. T. 133; 99 J. P. 93; 51 T. L. R. 131; 79 Sol. Jo. 11; 33 L. G. R. 39	571, 576
Wingate <i>v.</i> Waite (1840), 6 M. & W. 739; 9 L. J. Ex. 319; 4 Jur. 860	626
Wingrove <i>v.</i> Morgan, [1934] Ch. 423; 103 L. J. Ch. 52, 209; 150 L. T. 471; 50 T. L. R. 100; 77 Sol. Jo. 867 ...	420
Winterbottom <i>v.</i> Lord Derby (1867), L. R. 2 Ex. 316; 36 L. J. Ex. 194; 16 L. T. 771; 31 J. P. 566; 16 W. R. 15	380
Wood <i>v.</i> Waud (1849), 3 Exch. 748; 18 L. J. Ex. 305; 13 L. T. O. S. 212; 13 Jur. 472	617

	PAGE
Wood Green Urban District Council <i>v.</i> Joseph, [1908] A. C. 419 ; 77 L. J. K. B. 924 ; 99 L. T. 733 ; 72 J. P. 393 ; 24 T. L. R. 850 ; 52 Sol. Jo. 726 ; 6 L. G. R. 980	504
Woodward <i>v.</i> Hastings Corporation, [1945] K. B. 174 ; [1944] 2 All E. R. 565 ; 114 L. J. K. B. 211 ; 172 L. T. 16 ; 109 J. P. 41 ; 61 T. L. R. 94 ; 43 L. G. R. 29	456
Worthington <i>v.</i> Hulton (1865), L. R. 1 Q. B. 63 ; 6 B. & S. 943 ; 35 L. J. Q. B. 61 ; 13 L. T. 463 ; 12 Jur. N. S. 73 ; 14 W. R. 632	392

Y

YABBICOM <i>v.</i> King, [1899] 1 Q. B. 444 ; 68 L. J. Q. B. 560 ; 80 L. T. 159 ; 63 J. P. 149 ; 47 W. R. 318 ; 43 Sol. Jo. 190	223
Young <i>v.</i> Davis (1863), 2 H. & C. 197 ; 2 New Rep. 205 ; 9 L. T. 145 ; 10 Jur. N. S. 79 ; 11 W. R. 735	446
Young & Co. <i>v.</i> Leamington Corporation (1883), 8 App. Cas. 517 ; 52 L. J. Q. B. 713 ; 49 L. T. 1 ; 47 J. P. 660 ; 31 W. R. 925	454

PART I

LOCAL AUTHORITIES

SUMMARY

	PAGE
CHAPTER I. Introduction	3
CHAPTER II. Local Authorities	41
CHAPTER III. Alteration of Areas	66
CHAPTER IV. Representation	87
CHAPTER V. The Practical Working of Local Authorities	121
CHAPTER VI. Local Government Finance	151
CHAPTER VII. Audit	195
CHAPTER VIII. Bye-laws	213
CHAPTER IX. General Powers of Local Authorities	225
CHAPTER X. The Administration of Justice	240
CHAPTER XI. The Metropolis	254

CHAPTER I

INTRODUCTION

Organisation of State Services.—Thomas Hobbes in the quaint language of the seventeenth century reminds us that the wielding of “both swords, as well this of war as that of justice,” is the essential purpose of the State. In more modern phrasing the primary functions of the State are two : the protection of its members from external aggression and the maintenance of internal peace and security. The first function leads to the upkeep of military forces and to the practice of diplomacy—both activities that do not concern us since their direction is kept rigidly in the hands of the Central Government. The maintenance of internal security, however, though in its simplest form strictly confined to the provision of courts of law and executive officers charged with carrying out their decisions, is hard to confine to such narrow limits, and with the passage of time extends its boundaries until, except in times of emergency, it occupies the prior place both in the interests of the people and in the activities of Government. Law courts soon make necessary some form of police, and with the urbanisation of the country, police protection needs aids such as street lighting. The crowding of population into towns raises in turn new dangers threatening internal security in a more subtle manner than direct breaches of the peace. Sanitation becomes an acute problem, and legislation designed to promote public health further extends the limits of State action. Moreover, with the growth of these essential services, it is seen that the State forms an obviously convenient engine for promoting other services which different ages regard as

convenient or necessary and which individual enterprise is unable or unwilling to provide for itself. The maintenance of roads and bridges and the relief of destitution are instances of such matters which for long have been regarded as proper activities for the State. In more modern times the Post Office, the provision of education, the several forms of pensions and insurance, have been undertaken by the State as the sole power capable of obtaining for its citizens the advantages to be derived from their co-operative efforts.

In the result the internal activities of the State have grown enormously, particularly in modern times, and this leads to the problem of how their administration is to be organised. An examination of the current position in England enables one to see that, broadly speaking, State services may be divided into two classes, in accordance with the methods of their organisation. In the first place, matters of national importance affecting the whole country equally are administered on a centralised system. Normally in such cases administration is in the hands of the Departments under the immediate control of the Central Government. In some of these functions not even local agents of the Government are necessary. For instance, the making of law and the conduct of foreign affairs are solely the respective functions of Parliament and the Foreign Office. On the other hand some centrally administered services are diffused among the people in their operation, and require the maintenance of a host of civil servants scattered throughout the land, to perform, as agents of a Government Department, the executive acts necessary for the proper administration of the service. Thus the assessment and collection of taxes, the Post Office, employment exchanges, pensions, and forms of national insurance are organised in this manner.

But in modern times there has developed a practice of creating semi-independent "Public Corporations" charged with the administration of functions which are either considered to be better removed from the direct political control of the Government and Parliament or are primarily sectional in the interests they serve. No clear-cut theory has emerged

as to their employment or constitutional position, but the British Broadcasting Corporation and the Unemployment Assistance Board are instances of the former type, while the various Agricultural Marketing Boards sufficiently illustrate the use of this machinery for furthering sectional interests. Again such bodies vary in their powers and relation to the Central Government. The Electricity Commissioners are little more than a technical branch of the Ministry of Transport, while the Unemployment Assistance Board stands in a position of marked independence. As in the case of the Central Departments themselves, the nature of the functions administered by these Public Corporations determines whether they require to employ local administrative agents, as does the Unemployment Assistance Board, or can perform their functions in a centralised manner, as does in effect, the British Broadcasting Corporation.

Local Government.—Centrally administered services, whether directly under Government control or under the control of Public Corporations, and even when largely carried on through local agents, are to be carefully distinguished from other functions which form the subject-matter of local government. It might be thought that local government could be easily defined ; but this is not the case. Primarily indeed the functions covered by the expression "local government" are of local, rather than of national importance. But no certain line can be drawn here, for accident or convenience alone seems to have determined whether certain matters should be performed on a national or a local basis. In the relief of destitution, for instance, public assistance is locally administered, but unemployment assistance is administered nationally through the local agents of the Unemployment Assistance Board. Again, air-raid precautions, which may be regarded as a part of the national system of defence, fall within the sphere of local government, while labour exchanges, which largely cater for purely local needs, are controlled through local agents by the Central Government. Indeed the field of local government

cannot be determined by any theoretical consideration of the type of service it should include. Rather it must be defined by reference to the organs through which it is administered. From this point of view it may be said that local government consists of those functions which are carried on by local authorities.

Local Authorities.—In turn local authorities are difficult to distinguish by any sharply defined characteristics from other organs of English government. On analysis, however, it may be said that they are all possessed to a greater or less degree of four features which serve to differentiate them from the local agents of the Central Government or of the modern Public Corporations administering certain services on a national basis. Local authorities are legally independent entities ; they are popularly elected ; they have independent powers of local taxation ; and they are to a certain degree autonomous. Each of these features needs a brief consideration.

In the first place local authorities are legally independent entities. They have separate legal existence as corporate bodies : they are not mere off-shoots of the Central Government nor are they in law servants of the Crown. The officers employed by local authorities are in law the servants of the corporate bodies appointing and paying them, and are not civil servants.

Secondly, in modern times local government is administered by local authorities each acting in a particular area and elected by the inhabitants of that area. This dependence on local election serves in the political sphere to support the legal independence of local authorities. Local authorities are neither legally nor politically the agents of the Central Government. But though election does provide at the present day a mark for distinguishing local authorities from those local agents through whom centrally administered services are carried on, the introduction of elected local authorities is comparatively recent, and they have replaced authorities in many cases appointed by the Crown. Again, consultation of local opinion is not peculiar

to local government. There are a number of local committees set up to assist in the administration of services which are centrally controlled. Instances of such bodies are the insurance committees under the National Health Insurance Act, 1924, and the area advisory committees set up by the Unemployment Assistance Board. Such bodies, however, lack the political weight which popularly elected local authorities inevitably derive from the method of their composition.

A hybrid body of a similar nature may be seen, as a result of the war, in the local Food Control Committees, which are appointed on the nomination of local authorities in accordance with regulations, and subject to the approval, of the Minister of Food.

Thirdly, local authorities have powers of raising the money necessary for the prosecution of their activities by levying rates upon the occupiers of land in their areas, while neither the Departments of the Central Government, nor Public Corporations, nor their local agents have any powers of taxing, but must rely upon Parliament or their peculiar sources of revenue to provide them with such money as they may need. This is a mark of real distinction. Local authorities are unique in their powers of rating; but too much stress must not be placed upon this factor, for the modern system of grants in aid means that to a large extent local authorities are financed out of moneys provided by Parliament.

Lastly, to a certain degree local authorities are autonomous bodies, free to decide for themselves questions of policy affecting the localities administered by them, and not bound to act as mere agents for the carrying out of a uniform plan centrally prescribed. The extent of this independence varies considerably. Obviously complete autonomy of local bodies would spell anarchy. Some relation must be established between local authorities and Central Government; it is necessary to prevent local government from conflicting in

its activities and aims with the wider purposes of the nation. Again, the standard at which local government services are to be administered may become a matter of national importance. History is full of examples of functions at first purely local in their importance becoming with the passage of time vital to the whole population of the country. In earlier days the maintenance of roads and bridges was a matter of purely local concern ; now, with the growth of speedy road transport, it may well be considered of an importance transcending the boundaries of any local authority. In a similar manner public health is of equal importance everywhere, for insanitary conditions in one place may lead to the spread of a nation-wide epidemic.

Thus the necessity for orderly working of all State activities and the progress of time, raising to the proportions of national problems the petty local affairs of yesterday, bring to the fore the question whether local government should not progressively be superseded by services centrally administered. In other words, is centralisation or decentralisation to be the system of organisation for those services which as a matter of history started by being locally administered ? So far in England the result has been a compromise, though there is a tendency towards the transfer of certain functions to larger authorities, and particularly towards the concentration of functions in the hands of the county and county borough councils. Functions primarily of local importance are still administered by local authorities, though with increasing control by Central Departments. Local bodies continue to act locally with wide powers of discretion and decision, but Departments of the Central Government have obtained considerable control over their activities, both by powers of veto, and even by the right, in some cases, to compel a reluctant local authority to act.

History of English Local Government.—Whatever attempts are made to define local government, ultimately we must recognise that its sphere, and even the meaning of the term in England, are not to be discovered by any *a priori*

definition. Rather the true method of approach to an understanding of the English system of local government is by way of its history. The bias of English history has been in favour of local self-government, and that bias has insured that, even though central control has increased, services formerly administered locally should still be performed by local authorities, and that new services should wherever possible be given to local authorities to administer. To that history we must now turn.

The history of local government in England from the Norman Conquest to the present day can be regarded as falling into five well-marked epochs, during each of which a particular organisation of local authorities was the outstanding characteristic. Now, at the end of the war in Europe, it seems possible that a new epoch is about to begin, which may result in a further drastic reorganisation and simplification of local government. It is, as yet, too early to judge the scope and extent of the present trend, but its beginnings may be seen in the consolidation of educational functions in the county and county borough councils which took place under the Education Act, 1944. A tendency towards greater governmental control is also apparent. Thus the history of English local government appears rather as a history of institutions than of functions, and at the present day, for anyone who wishes for more than a heterogeneous yet incomplete catalogue of powers and duties, an examination of local authorities, rather than of local government services, forms the surest guide to the subject.

1. Mediaeval Period : (a) County Organisation.—

During the Middle Ages the country was predominantly engaged in the practice of agriculture, and purely industrial towns were comparatively few and small. Hence the population was widely scattered, the problems which beset a modern urban people were largely unknown, and an extensive system of local government was a necessity. The country was for this purpose divided into counties, at the head of each of which stood the sheriff appointed by the Crown, and possessed of

such wide powers that Maitland could speak of him as in effect "a provincial viceroy" (a). But though a representative of royal power in his county the sheriff was not absolute in his sway. Each county was governed by a county court composed of all the freemen of the shire. This court must not be thought of as a purely judicial body (b). It had judicial work to perform, but the word "court" in those times indicated rather a governmental assembly than the solely judicial body which in later ages it came to designate (c). The county court under the presidency of the sheriff was then what we should now call the local authority for the county, though with the passage of time there was a tendency for it to become regarded as a judicial body, in respect both to the matters it dealt with and to the forms of its procedure.

In turn each county was divided into hundreds, each governed in a similar manner by the hundred court composed of the freemen of the area, and under the presidency of the bailiff appointed by the sheriff as his deputy. Both the county and the hundred possessed characteristics which later law regarded as peculiar to corporations. Thus the hundred was till 1340 liable for the payment of the murdrum fine whenever a Norman was found secretly killed within its boundaries, and it remained liable for robberies and riots. Under the Statute of Winchester, 1285, it obtained a new officer, the high constable, who was charged with supervising the application of the Assize of Arms.

Below the hundred came the vill or township. But this local government area was rudimentary in that it had no court to govern it. Instead it was characterised by the frankpledge system, which was a primitive form of police. All men, in origin, were required to form themselves into tithings, or groups of ten, under a tithingman or headborough, the members of each group being mutually responsible for each others' breaches of the law. After 1285 petty constables were

(a) *Constitutional History of England*, pp. 41, 233.

(b) Nor confused with the modern county courts which were set up by statute in the nineteenth century for dealing with small causes.

(c) See Plucknett, *Concise History of the Common Law*, 2nd Edn., p. 131.

appointed for vill, these new officers frequently superseding the older tithingmen and assuming their functions.

Control over the smaller areas of hundred and vill was obtained by the system of the sheriff's tourn, for twice in each year the sheriff of the county attended the hundred court in an inquisitorial capacity. Originally his function on these occasions was to hold the view of frankpledge: to see that the tithings were full, that every man was in a tithing, and to punish the members of any tithing who had failed to keep the peace. To this original purpose the Assize of Clarendon added the more modern jury of presentment. The result was that at the tourn the tithings appeared, each by its tithingman, the vills were represented by their reeves and four best men, and these assembled officials were required to frame answers to the list of questions in the "articles of the tourn." These answers were presented to a jury of twelve men representative of the whole hundred, and, if this jury accepted the presentments, the accused were either sent for trial before the King's judges or amerced by the sheriff. The development of this procedure by presentment was an important contribution to local government in later ages (*d*).

However, in practice, the vill was also usually co-terminous with the areas of two other institutions, each at different times designed to provide the machinery of local government—the manor of feudalism and the parish of the Church. It was the manor which in the Middle Ages provided the local authority of the vill, for the manorial court, already regulating the agrarian system, easily extended its powers into the sphere of local government. This extension was favoured by the practice impecunious princes adopted of selling royal rights to feudal lords, so that it became not unusual for a manorial court also to possess, by derivation from the Crown, the view of frankpledge for the vill or manor to the exclusion of the sheriff's tourn, and to be known when acting in this capacity as a court leet. Moreover, the manorial court appointed the representative of the vill, the reeve, and the leet appointed the one

local official as yet recognised by the law, the constable. In general the presence of feudalism and the prevalence of franchise jurisdictions granted by the Crown served to impose upon the uniform communal organisation a patchwork of exceptional areas. The effects of this were most marked in the case of the boroughs.

(b) **The Boroughs.**—Outside the county organisations stood the boroughs. In these early days they were little more than villis with a comparatively dense population where trade and commerce were carried on. Each borough has its own peculiar history, but many originated in villis which were the site of a fortress or market, though others were deliberately created by far-sighted lords. Broadly speaking they were extra-county and outside the feudal hierarchy; but the exclusion of the sheriff and the feudal lord was by no means uniform. The position of each borough varied in accordance with the privileges which money or favour had been able to obtain for it. These privileges varied from the comparatively narrow rights which a feudal lord could grant to the wide franchises which could be obtained only by royal charter. Trading privileges, such as the right to have a gild merchant, borough courts corresponding to leet, manorial or even hundred courts, tenurial and procedural privileges, and, by royal charter, exemption from hundred, county and sheriff were obtained by various boroughs. Lastly the *firma burgi*, the farming of the borough by the burgesses in return for a fixed rent paid to the Crown, gave to boroughs a peculiar position and made necessary a higher degree of internal organisation than in other villis. Because of the greater privileges which the Crown could alone grant, royal charters were sought, and soon the grant of such a charter came to be regarded as a test of borough status. In the later Middle Ages boroughs, of all the areas of local government, could point to these charters as a proof that they were bodies corporate.

For the purpose of parliamentary representation each

borough formed a constituency separate from the county, and this fact in later times led the Crown to create large numbers of boroughs with close corporate bodies, alone electing to Parliament and excluding the general mass of burgesses from all share of local government.

(c) **Central Control.**—Such were the institutions of local government in the Middle Ages ; but the picture is not complete without the corresponding system of central control, which existed to prevent the anarchy which complete autonomy of local authorities would have produced. In the first place, then as in all succeeding ages, the general law of the land was paramount, and this meant the law as laid down in the royal courts or enacted by Parliament. But secondly, a rigorous system of administrative inspection served to acquaint the Central Government with the activities of local bodies and officers, and to correct or punish their misdoings. This central control was exercised by the justices in eyre. From as early as Henry I's time commissions were issued to itinerant justices, and in Henry II's reign these became distinguished into various classes, the most important being the commission *ad omnia placita*, or general eyre. In time it came to be recognised that the eyre should not visit a county more than once in every seven years. In purely judicial matters the coming of the eyre meant that all business relating to the county was automatically adjourned into the court of the itinerant justices, but it is rather with the administrative side of the eyre that we are concerned. Broadly speaking the justices in eyre held a particularly full sitting of the county court. Before them came all persons who had held office as sheriff, etc., since the last eyre. Each hundred and each borough was represented by a jury of twelve, each vill by the reeve and four men. Moreover, the rolls and records of every officer and court had to be delivered to the justices. Then the business of inquisition began. The justices were armed with a long list of questions known as the articles of the eyre, and, by examination of the rolls and records and by presentments of the juries, delinquencies and misdoings of

officers and communities were brought to light and followed by amercements imposed upon the wrongdoers (*e*).

The eyre thus formed a most efficient engine for inspection and control over the whole field of local government and, on occasions, a means of cruel oppression, so that it is not surprising that it became unpopular, and finally, somewhere during the reign of Edward III, fell into disuse.

(d) Decay of Mediaeval System.—Though local government in the Middle Ages was mainly organised through county, hundred and manorial courts, yet during the latter part of this period there were growing up other institutions destined to take the place of the older order, and at the same time that older order was weakening. A period of transition from the mediaeval to the Tudor system of local government occurred. Most important in this connection is the rise of the justices of the peace, but, though they helped to accelerate the decline of the sheriff and the system dependent upon him, that decline cannot be fully understood without the consideration of other factors. First, as early as 1194 coroners were instituted, elected by the county court to act as a check upon the sheriff. Soon the growth of royal justice led to the fall in importance of local courts as judicial bodies, a fall which was reflected in their activities in administrative matters. Lastly, the sheriff as the result of popular agitation became in the fourteenth century merely an annual officer, and henceforth unfitted for the proud position he had formerly occupied.

Justices of the Peace.—Meanwhile the justices of the peace had successfully grasped at every shred of power let slip by the sheriff. Early in the reign of Edward III the appointment in each county of conservators of the peace had been provided for by statute, and those persons were soon given powers comparable to those wielded by the sheriff in his tourn. In 1359 they were combined with the justices appointed to enforce the Statute

(*e*) See Bolland, *The General Eyre*.

of Labourers, and in 1361 they were spoken of as justices of the peace. By later statutes their judicial work was put upon its present footing by the institution of quarter sessions, where, with the aid of grand and petty juries, the justices tried criminal cases (f). Thus the justices of the peace had, by the end of the fourteenth century, obtained wide police and criminal jurisdiction, and in consequence soon tended to attract to themselves complete control over the existing constabulary. But later centuries were to see a vast accession to their powers in two other ways. First, statutes in the fifteenth century commenced the ever-swelling stream of powers conferring upon two justices of the peace the right to hear and determine petty offences in a summary manner without the aid of a jury. This process has been of immense importance, leading directly to the supersession of the police jurisdiction implied in the view of frankpledge, and making necessary the regular institution of petty sessional divisions. These divisions of the county roughly corresponded with the old hundreds, and, though in theory any justice on the commission of the peace for the county could act anywhere within its boundaries, in practice only those justices resident in the division acted in petty sessions for that area. In time petty sessions came to be almost as well organised as was the business of quarter sessions. Regular sittings were instituted as occasion demanded, and, while the clerk of the peace acted as clerk to quarter sessions, each petty sessional division appointed its own justices' clerk.

Secondly, powers of an administrative nature were soon heaped upon the justices of the peace. But with their erection into the position of a local authority one point should be emphasised. The justices of the peace were appointed by the Crown by having their names put upon the commission of the peace for a particular county. Except in boroughs which had managed to purchase the right to a separate commission with the power to elect their own magistrates, justices were

(f) Grand juries were abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1933.

therefore essentially royal nominees controlled to a considerable extent by the inquiries and instructions of the Privy Council.

In the county, during the latter part of the Middle Ages, the sheriff and the whole system of local government, which in the county and hundred courts depended upon him, had declined greatly in importance and power, so that the time was ripe for the introduction of a new system based upon the rising might of the justices of the peace. But a similar process had been going on in the manor. The manorial court had sunk in proportion to the rise of royal justice, and the increasing powers of the justices of the peace rendered the leet moribund. Moreover, the general decay of feudalism and some movement in the way of changed agricultural conditions all tended to cause the obsolescence of the manor as a local government unit.

The Parish.—But just as the manor had acquired importance because it gave an organisation to the vill, so now the Church was able to provide a new organ of government for the same area. The building of churches and the endowment of priests had in general been determined by the wants of each manor, so that the parish was frequently no more than the manor as seen through ecclesiastical eyes.

The expenses of the repair and maintenance of the church fabric and the provision of its furniture had led to the necessity for some call upon the financial resources of the flock, implying in turn the growth of a parochial organisation. The voting of money for church purposes was the function of the whole body of parishioners met for the purpose in the vestry, and this body elected at least one of the two churchwardens who managed parochial affairs and in whom the law recognised the ownership of the church furniture to be vested. Thus in each parish a definite set of institutions had grown up, capable of giving some of the elements of local life to the community on the decay of the manorial organisation. The vestry formed a governmental assembly. Usually it was an open vestry

composed of all the ratepayers (*g*), though in some parishes select vestries grew up, which were close bodies kept alive by co-optation and which had probably grown out of some executive committee appointed by the earlier open vestry which they had superseded. The vestry had powers of rating by the voting of church rates, and it appointed as its executive officers the churchwardens.

x. The Tudor System.—In Tudor times the older system of local government, based upon the sheriff and the county, hundred and manor courts, had fallen into obsolescence, and though the justices of the peace had already inherited some of the powers of the institutions they helped to destroy, there had not yet been any attempt to rebuild local government on a new basis. But such a reorganisation could not be long delayed. New problems, which could only be solved by the creation of local machinery adequate for the purpose, faced the statesman. Destitution was no longer relieved by the now dissolved monasteries, and attempts to make the Church undertake the task failed, though they served to point the way to the recognition of the parish as the new unit of local affairs. Similarly the increase in commerce made some more modern system of road maintenance a necessity. The result was a recasting of local government for these purposes upon the basis of the parish and with the justices of the peace as the controlling and co-ordinating factor. This, the work of the Statute of Highways, 1555, and more especially of the Poor Relief Act of 1601, proved so successful that new services as they were created were fitted into the same framework.

(a) The Parish.—The new scheme was based on the parish, the existing vestry becoming the popular assembly for local government as well as for ecclesiastical matters. New

(*g*) There was no legal definition of membership of the vestry until Acts of 1819 confined it to ratepayers. In practice it seems generally to have been assumed that ratepayers alone could vote, though this may have been a limitation upon an earlier practice under which all the parishioners were members of the vestry.

poor rates were raised parochially on the analogy of the existing church rates, and, as further local government services came into existence, the money needed for their support was raised by rates based on the machinery of the poor rate. This fact served to perpetuate until modern times the use of the parish as the primary unit of local government. Executive officers were provided on a parochial basis, either by adapting those already in existence, as the constable and the churchwardens, or by the creation of new ones, such as the overseers of the poor and the surveyor of highways. The persons annually filling these offices were unpaid and yet compelled to serve, thus differing greatly from the officers of a modern local authority. But though the Tudor poor law and highway legislation adapted the parish and its ecclesiastical organisation to the purposes of local government, this was not so violent a change as might be thought, for the parish was usually merely the *alter ego* of the township and manor.

(b) Justices of the Peace.—Control of the parish and its officers was vested in the justices of the peace. Nearly all the acts of the vestry, such as the raising of a rate or the appointment of a surveyor, needed the sanction of justices, who in addition had a considerable power to interfere and compel the due performance of parochial duties, and acted as a court of appeal from the vestry and its officers. Moreover some matters, such as the maintenance of bridges, the building of gaols and the raising of rates for these and kindred purposes, had to be dealt with on a broader basis than the parish could provide, and necessitated the adoption of a new county authority, which was found in the justices assembled in quarter sessions.

As we have seen, the justices of the peace were appointed for each county by the Crown, and a continually increasing stream of legislation gave to them wide administrative powers. In some matters one single justice could act, as for instance in ordering the overseers of a parish to give relief to a pauper. In other matters two or more justices sitting in petty sessions

could act. For licensing alehouses and similar matters special sessions were held, consisting of all the justices of the petty sessional division. Lastly, both as an appeal tribunal from lower authorities and as the local authority for the whole county, quarter sessions replaced in importance the earlier sheriff and his county court.

(c) **Central Control.**—The Tudor statesmen who introduced this new hierarchy of local authorities were not insensible to the need for some form of central control at once subordinating and binding local aims to national policy. Their choice of institutions for the new system of local government, though undoubtedly determined by the fact that these institutions were already flourishing and showing promise of further usefulness, was consciously biased by the ease with which central control could be imposed on them. The Reformation had led to a realisation that the old order of political organisation was dead, and, at a time when in international affairs the recognition of the sovereign and independent state was becoming essential, local autonomy could no longer be tolerated. Centralisation was therefore their aim, and its attainment was subtly realised. Indeed, but for a subsequent historical accident, true local government might have died in England, and a system of centralised direction, bound up with an administrative law excluded from the jurisdiction of the ordinary courts, might have flourished here as on the Continent.

The Elizabethan system recognised the popular will of the governed only to the smallest extent. The parish had the vestry, and boroughs to a varying extent still stood outside the general scheme. But the vestry in almost all its acts was subject to the approval of the justices, and all other activities of local government were likewise in their hands. Justices of the peace were not, however, popularly elected. They were royal nominees appointed only during good pleasure, and so liable to instant dismissal. In their hands local government truly rested. They could not but be subservient to the royal will, and during the Stuart period they were minutely directed

by the Privy Council and controlled by its judicial committee, the Star Chamber. Just as in the county all power led up to quarter sessions, so in the country as a whole all power was finally centralised in the Government of the day acting through the Privy Council.

During the Civil War this central control broke down and through the weakening of the Council by the abolition of the Star Chamber in 1642 it was permanently injured. Finally it entirely disappeared through an ill-conceived attempt on the part of James II to interfere with the independence of the boroughs. For political purposes he attempted to force upon the boroughs new constitutions which destroyed local autonomy, and subjected them to the closest direction of Government. The procedure adopted was the forfeiture of charters for alleged breaches of their provisions, followed by the grant of new charters containing the new constitutions. This flagrant piece of judicial annihilation was one of the immediate causes of the Revolution of 1688 which cost James his throne, and that there should be no interference by the Central Government in locally administered affairs became a principle of the Revolution Settlement, which served to prevent the exercise of any form of central administrative control throughout the eighteenth century.

After the Revolution the Elizabethan structure of local government through the justices of the peace continued to exist, shorn however of its countervailing system of central control. The result was an extreme form of local autonomy, which has survived in an attenuated form as a legacy to the present day.

3. The Eighteenth Century.—During the eighteenth century, therefore, local government was centralised no further than in quarter sessions. This body consisted of all the justices on the commission of the peace for the county, and met four times a year, or more often, if necessary, by adjournment. Originally it had been created primarily as a criminal court of law, and when it received administrative functions

to perform it was natural that, at first at any rate, it should follow the procedure by presentment which it had inherited from the tourn. Thus in dealing with a person accused of crime, quarter sessions had to wait, before its jurisdiction could attach, until the grand jury had found an indictment, and then the trial took place before a petty jury. In administrative matters, such as the decision to repair a county bridge, quarter sessions was obliged to act in a similar way, and await the presentment of the grand jury that the bridge was out of repair. In theory, therefore, quarter sessions, even in the manner in which it dealt with administrative work, should follow judicial procedure. In fact, however, in the eighteenth century this formalism broke down. First, by various statutes the presentment of parish officers or of a justice was made equivalent in administrative matters to the formal presentment of a jury. Later even the fiction of judicial form disappeared, and after the judicial work of sessions had been finished the justices adjourned into a private meeting for the discussion of "the county business," as their administrative work was called. County officers grew in number as the servants of quarter sessions. To the clerk of the peace were added the county treasurer, the county surveyor, and a host of minor officials. Quarter sessions acting as the local authority for the county often came to regard itself as a local legislature, and the "Speenhamland Act of Parliament," whereby the county justices of Berkshire in 1795 by resolution fixed a general scale for the relief of paupers, was soon adopted by a number of county benches (*h*).

Judicial Control.—All this development was, during the eighteenth century, entirely free from any central administrative control, for even the power of dismissing a justice had, except in cases of misconduct, fallen into disuse. But, apart from the legislative powers of Parliament, there did nevertheless exist some form of control which was exercised by the Court of

(*h*) See S. and B. Webb, *English Local Government, The Parish and the County*, vol. I. pp. 544-550.

King's Bench, a purely judicial body. Quarter sessions and justices might follow administrative forms in dealing with local government matters, but they could not by so doing alter the true nature of their acts. In the eye of the law they composed a court of justice, and must act at least in a manner not repugnant to judicial sense. The result has been that

“our local government has been carried on with judicial forms and in a judicial spirit. Our county rulers have been not prefects controlled by a bureau, but justices controlled by a court of law” (i).

Hence by the prerogative writs of *mandamus*, prohibition, and *certiorari* (j) the King's Bench could compel justices to do their duty and prevent them from exceeding the powers conferred upon them by law. But this type of control suffered from two defects. In the first place it was expensive and only came into operation when a party sufficiently interested and sufficiently wealthy chose to move the court. Many refusals by justices to fulfil their duty, or excesses of power must have gone unchecked for the want of a prosecutor qualified to undertake the application to the King's Bench. Secondly, this control was exercised by a law court, and must have suffered from the defects of the organ which exercised it, when dealing with matters for which it was not constitutionally adapted. The tendency of history in England has been for the “judicialising” of all forms of public authority, and in no case is it more striking than in connection with the control by the King's Bench over quarter sessions. But a law court is bound by its own decisions—it can make the law once, but forever after it is unable to alter what it has itself laid down. There can be no development of policy or gradual unfolding of new principles to suit changed times. Again, the procedure of a court of law is not as readily suited to the decision of administrative problems as the freedom of a government department; the court must decide, the department may conciliate and endeavour to reach

(i) Maitland, *Justice and Police*, p. 85.

(j) And the orders which under the Administration of Justice (Miscellaneous Provisions) Act, 1938, supersede them. See below, p. 385.

an acceptable compromise. Lastly, the machinery at its disposal makes judicial control fragmentary. It cannot review the administrative decision in its totality and give a new decision of its own. The prerogative writs only enable the court to say that a duty has not been carried out and to order its proper fulfilment, or that there has been an excess of power and to order its annulment; they do not permit any attack upon the substance of a decision honestly come to by a local authority, so long as it is within the powers conferred upon it.

Hence, in spite of the existence of a controlling force in the King's Bench, in actual fact little of even this form of control was exercised during the eighteenth century upon the practically autonomous justices. This practical lack of control, coupled with the manner in which amateurs viewed the legal limits of their powers, served to raise their rule to the very pretence of local sovereignty.

“*Ad hoc*” Authorities.—In one respect, however, the eighteenth century introduced a new element into local government. This was the “*ad hoc*” authority. The old county court and the justices of the peace may be contrasted as being “*omnibus*” authorities—that is, they were general local authorities to whom all new powers of local government were naturally granted, so that they had many functions combined in themselves simply because they were all exercisable within the same area. The *ad hoc* authority on the other hand is set up expressly to conduct one service alone within a particular area, which need not coincide with the area of any other authority dealing with different activities.

New problems, both in urban and rural areas, led to the introduction of this new machinery. Already, however, the peculiar requirements of land drainage had necessitated exceptional treatment and commissioners of sewers controlled areas specially suitable for their functions. A similar solution was now adopted for other services. In the eighteenth century the borough organisation became corrupt and ineffective. Too many boroughs had been created primarily for the packing of

Parliament, and their governing bodies were too close in their composition to enable the spur of popular opinion to urge them to an adequate discharge of their local government duties. To some of them the change in the economy of the nation, consequent upon the increase of manufacture, brought vast increases of population attended by all the dangers inherent in urbanisation. Moreover not all thickly populated areas had then received even the dignity of incorporation as boroughs. Such places as Manchester and Birmingham did not reach the status of boroughs until the nineteenth century, and during the eighteenth century, in order to provide themselves with some form of local government, had to make the most of the remnants of manorial organisation eked out with the assistance of reluctant county justices.

(i) **Improvement Commissioners.**—These difficulties led to appeals to Parliament, which by local Acts created various *ad hoc* bodies of commissioners or trustees, usually, in later times, elected by their ratepayers but with an *ex officio* element drawn from the justices or existing municipal corporations, and charged with such duties as paving, watching and lighting, street cleansing and general improvement, and given necessary powers of rating. These improvement commissioners proved generally efficient in tackling the problems raised by the massing of population, and their appointment, depending to some extent upon popular election, helped to make them the models which the Radicalism of the early nineteenth century copied in its reform of local government.

(ii) **Corporations for the relief of the Poor.**—Eighteenth-century poor law reformers were impressed with the poverty of the machinery provided by the general law for the relief of the poor. The amateur parochial overseers of the poor, appointed annually and compelled to serve unpaid, were regarded as unsatisfactory, and the smallness of the parish as a unit of administration, especially in urban areas, pointed to the need for a wider area able to support a better class of

administrator. The result was that in certain places there were set up by local Acts corporations for the relief of the poor. These bodies, normally starting in the optimistic belief that the poor could be made self-supporting, often built ambitious workhouses. They failed in their primary object, but in many cases they improved the technique of poor relief and led the way to the poor law reforms of the nineteenth century.

(iii) **Turnpike Trustees.**—Another sphere within which *ad hoc* authorities were largely employed in the eighteenth century was that relating to highways. With the growth of commerce and travel the stage coach became a necessary means of transport and the parochial system of road maintenance proved hopelessly inadequate for the new requirements. Hence local Acts were passed setting up turnpike trustees charged either with maintaining existing main roads or with the building of new ones. Rating the parishes through which the roads passed being obviously an unfair method of financing the work, the trustees were empowered to levy tolls on those using the roads. Though the activities of turnpike trustees served to provide many of the main roads of present-day England, on the whole their administration was not satisfactory, but nevertheless they continued to exist in gradually decreasing numbers during the greater part of the nineteenth century (*k*).

4. **The Nineteenth Century Reforms.**—The heyday of the justices was followed by the reforming zeal of the nineteenth century, the first part of which comprises the fourth period in the development of local government. This meant the stripping of power from the justices in favour of the universally applied principles of democracy. But it also meant the gradual extinction of the parish and the root-and-branch reform of the boroughs. A new era was to be ushered in, so that it is as well to pause for a moment and contrast the principles upon which reform was to act with those which had sufficed for the older system of local government. In the first place, after the Revolution of 1688 it had become an axiom

(*k*) See S. and B. Webb, *op. cit.*, *Statutory Authorities*, Vol. IV.

that there should be no interference in, or control of, local affairs by the Central Government. The first reform of the nineteenth century, that of the poor law in 1834, roughly disregarded this principle and initiated a growing system of central control. Secondly, the actual work of local government previous to the nineteenth century had been largely performed either by the actual members of local authorities, such as justices of the peace, or by unpaid officers compelled to serve their turn. Thus the parish constables, overseers, surveyors and churchwardens all held compulsorily imposed unpaid offices, and the actual labour of repairing the parochial highways had to be performed, under the directions of the surveyor, by the inhabitants themselves. The aggregation of population in towns rendered such a system totally unworkable, however well adapted it might be to an agricultural community only concerned with the comparatively simple matters of the relief of the poor, the maintenance of highways, and the suppression of nuisances. The vast extension of the services, which the nineteenth century was to see performed as a matter of course by local authorities, served to emphasise this point. The results were many : current political opinions led to the introduction of elected bodies, and necessity introduced the paid expert to local government administration. Hence the relation between the governed and their governors became one determined merely by money, since all that was asked of the inhabitant of an area was that he should annually pay the rates levied upon him by the local authority. On the principle that he who pays the piper should be permitted to call the tune, the realisation of this changed relation led to a practical restriction of the local government franchise to the ratepayers, though a relic of older ideas remained for some time in the granting of the vote to property owners. The franchise for local government elections remained narrower than that obtaining for parliamentary elections right up to the outbreak of the war in 1939, but the two franchises have at last been assimilated, in time for the resumption of local government elections (*1*), though the

(1) See the Representation of the People Act, 1945.

right to a separate ratepayer's vote has been retained. Local government in the nineteenth century came indeed to be regarded almost solely as the concern of the ratepayers, and as designed, apart from the exception of the poor law, merely to provide them with the benefits in the way of amenities for which they paid. Any wider conception of its purpose, any recognition of it as a system intended to facilitate in ordinary circumstances the gratuitous rendering by the community as a whole of services to those of its individual members who need them, has been slow in arising and has had for long to be subjected to the charge of pauperising the recipients.

Reform of Local Government.—The nineteenth century almost at its start set about considering the reform of local government, two major influences operating to make the work urgent. The first was the doctrinaire Liberalism which demanded popularly elected bodies, and the second was the practical necessity of facing new problems raised by the changing condition of the country, which, in turn, pointed to the introduction of *ad hoc* authorities as most likely to prove efficient. It was not, however, until these two influences were combined, by the return to political power of the party imbued with Liberal doctrines at the time of the Reform Act, 1832, that the great era of reform in local government commenced.

Doctrinaire Liberalism drew its inspiration from the work of that great philosophical reformer, Jeremy Bentham, and he, in this as in nearly every other branch of law and government, had clearly indicated the method of reform. Historical traditions were of no importance to him who conscientiously applied the test of utility to all institutions existing or projected and regarded them as bad or good according to their practical results. His scheme for the reform of local government was complex, but it is sufficient to note that he insisted that the areas, within which local authorities were to act, should be dictated purely by convenience of administration and not by existing local patriotism; that local authorities should be popularly elected, but that they should be subject to the most

stringent inspection and control by Central Departments. If these principles were adopted he was prepared to approve of considerable delegation of power (*m*).

(i) **The Poor Law.**—The practical application of Benthamite theories came as early as 1834. The poor law had sunk into a state not only unsatisfactory to all concerned, but positively dangerous to the nation. The smallness of the parish as the unit of administration, coupled with the absence of effective central control, had, in a time of distress consequent upon the long French wars and the contemporaneous change in the internal economy of the country, led to the most uneconomic use of the power of relieving destitution, amounting almost universally to a definite system of using the rates in aid of wages. After the inquiries of a Royal Commission the Poor Law Amendment Act, 1834, was passed. This measure set up a central, almost autocratic, authority in the Poor Law Commissioners with the widest powers of controlling local poor law authorities in the minutest details of their work. The areas of local administration were based purely upon convenience, and consisted of "unions" of parishes, sometimes even cutting across county boundaries, and administered by elected guardians of the poor. The whole Act closely followed the leading principles laid down by Bentham, except that it was sufficiently influenced by the experience of the preceding century to set up an *ad hoc* instead of a general local authority.

(ii) **Municipal Corporations.**—In the following year the work of the Reform Act of 1832 was completed by the reform of the boroughs. The Municipal Corporations Act, 1835, provided for a uniformly elected town council in the boroughs to which it applied, and finally divorced local government in the towns from the administration of justice by abolishing the system of election of borough justices by municipal corporations. But there the Act stopped: the boroughs had been so

(*m*) See Redlich and Hirst, *Local Government in England*, Vol. I, pp. 83-97.

corrupt that there was no wish to extend their powers. Consequently, beyond the management of corporate property, the control of police and the making of bye-laws, the Act conferred no powers on the reformed municipalities, and left it to later generations to transfer to town councils the powers already exercised in their areas by improvement commissioners. It followed that there was no need to provide any form of central control. The result in later days, when the municipalities came to be recognised as fitting instruments for local government, was that some conflict arose between the principles of utilitarian arrangement with strong central control, typified by the new poor law unions, and the principles of autonomous government of areas bound together by the local patriotism engendered by long historical traditions, which had been made use of in the reformed municipalities.

(iii) **New Authorities.**—Thereafter new problems bringing an ever widening scope for local government led to the creation of a welter of new *ad hoc* authorities, uniform only in that they were popularly elected. Highway boards, local boards of health, burial boards, school boards, school attendance committees, proliferated and intertwined with the areas of justices in quarter sessions, municipal boroughs, guardians, improvement commissioners and the largely denuded vestries. The details of this middle period of the nineteenth century are too complicated to be worth the labour of unravelling. It is sufficient to quote the words of a writer describing the position in the year 1885, as “a chaos of areas, a chaos of franchises, a chaos of authorities, and a chaos of rates” (*n*). In 1883 there were fifty-two counties, two hundred and thirty-nine municipal boroughs, seventy Improvement Act districts, one thousand and six urban sanitary districts, forty-one port sanitary authorities, five hundred and seventy-seven rural sanitary districts, two thousand and fifty-one school board districts, six hundred and forty-nine unions, one hundred and

(*n*) Rathbone and Pell, *Local Administration*, quoted in Redlich and Hirst, *op. cit.*, Vol. I, p. 194; and see note there setting out the state of confusion.

ninety-four lighting and watching districts, fourteen thousand nine hundred and forty-six poor law parishes, five thousand and sixty-four highway parishes, and about thirteen thousand ecclesiastical parishes. There were in addition eighteen different kinds of rates, and elections were held at different times, in different manners, and on different franchises. Moreover all the areas of these different authorities were capable of overlapping, except the union and the poor law parishes, the former being merely aggregations of the latter (o).

Lastly the extent to which these different authorities were subject to the control of Central Departments of Government varied considerably. The principles of the Act of 1834 have still survived to make the poor law the most centralised of all local government services. With the beginnings of public health legislation in 1848 an attempt was made to introduce a similar stringent central control ; but great opposition was raised, and the Central Government had to be content with a smaller measure of control obtained more indirectly in public health than in the case of the poor law.

During this period it gradually became evident that sanitary problems were becoming pre-eminent in importance, and public health came to be recognised as the most important branch of local government, so that the modern scheme of local authorities has developed out of those utilised for this purpose.

5. Period of Simplification.—The last period we have to consider in the development of local government is concerned with simplifying the chaotic mass of overlapping authorities and areas which the mid-nineteenth century had created. Already however, in the report of the Royal Sanitary Commission of 1871, there had appeared a suggestion that too many *ad hoc* authorities were not conducive to efficiency and that a return to a simple scheme of general local authorities was desirable. This idea became a ruling one towards the end of the century, and has been embodied in a series of statutes

(o) See Blake Odgers and Naldrett, *Local Government*, 2nd Edn. (1913), pp. 14-15.

commencing in the seventies and only ending with the Local Government Act of 1929.

(i) **Simplification of Areas.**—With the recognition that sanitary matters were the most important branch of local government this simplification has been brought about by the strengthening of the public health authorities. Legislation stretching from the seventies to the nineties (*p*) corrected the overlapping of areas and provided elasticity by permitting their future alteration, but only in such a way that the symmetrical arrangement of local government areas shall not be upset (*q*).

(ii) **Simplification of Authorities.**—The simplification of authorities cannot be dismissed in so summary a manner. The first step was taken by the Public Health Acts of 1872 and 1875, which codified the law upon the subject they dealt with, and mapped out the country into urban sanitary districts, in which the local authorities were borough councils, improvement commissioners and *ad hoc* local boards, and into rural sanitary districts co-terminous in area with poor law unions and governed in public health matters by the guardians. In 1882 the Municipal Corporations Act codified the legislation commencing with the Act of 1835, and made the boroughs more fitted to take that pre-eminent place among local authorities to which they have subsequently attained. The turn of the counties came in 1888, when county government was made more suited, according to modern ideas, to claim once more its old position by the transfer to new elected county councils of the administrative functions of quarter sessions (*r*). The same Act also created county boroughs of the larger municipalities, relieving them of subordination to the county and conferring on their town councils the powers of county councils within the confines of the borough. A further important step

(*p*) Divided Parishes and Poor Law Amendment Acts, 1876 and 1882, Poor Law Act, 1879, and the Local Government Act, 1894, §§ 1 (3) and 36 (2), now repealed as obsolete, Local Government Act, 1933, 11th Schd.

(*q*) Local Government Act, 1888, § 60, now Local Government Act, 1933, § 153. And now the practice seems about to start again: see the Local Government (Boundary Commission) Act, 1945; see below, p. 38.

(*r*) Local Government Act, 1888.

was taken by the Local Government Act of 1894. It brought into the new framework the sanitary authorities of the Public Health Acts as general local authorities governing county districts. Urban sanitary authorities, other than borough councils, henceforth became known as urban district councils, and in rural districts rural district councils were set up distinct from the guardians whom they superseded in public health administration (*s*). Secondly, the Act, in an attempt to revive local life in rural areas, created parish meetings and parish councils in the parishes comprised in rural districts.

In 1902 the Education Act, in place of *ad hoc* school boards and school attendance committees, made use of the new hierarchy of local authorities for the administration of the reformed system of public education which it set up, and thus inaugurated the policy of the twentieth century of rigorously confining the operation of local government services to what are now the only local authorities known to the law.

The last stage in the pre-war simplification of the system was completed by the Local Government Act, 1929. By that date the only *ad hoc* authorities of any importance still remaining were the guardians of the poor. The Act abolished them and transferred the matters they dealt with—the poor law and registration, which as the result of an historical accident had become attached to the poor law administration (*t*)—to county councils and county borough councils. Thus the final extinction of what one may be permitted to call “*ad-hoc-ness*” was brought about (*u*).

(iii) Simplification of Statute Law.—But though a hierarchy of general local authorities had thus at last been set

(*s*) Until 1929, however, the rural district councils were composed of the same members as the boards of guardians.

(*t*) Chadwick, the first secretary to the Poor Law Commissioners, procured the passing of the Births and Deaths Registration Act, 1836, and it was natural that the control over the local administration of the Act should be put in the hands of the guardians.

(*u*) This statement is not strictly true. There are still some *ad hoc* local authorities, notably in connection with land drainage (see below, p. 631), but substantially it is true to say that local government is now carried on by general, and not by *ad hoc*, authorities. It may be, however, that the pendulum has now begun to swing in the opposite direction.

up, one further reform was desirable before the whole system could be regarded as satisfactory. Both the statutes setting up and governing the constitution of the local authorities which compose this hierarchy and the statutes dealing with the particular services they administer were passed at different times, and in some respects had been subjected to considerable addition and amendment. The law of local government was ill-arranged and often difficult to find.

In the first place, in December, 1930, a Departmental Committee under the chairmanship of the late Lord Chelmsford was set up by the Minister of Health to consider the consolidation of the law relating to local authorities and local government and public health. The Committee presented an Interim Report in March, 1933 (*v*), together with a draft Local Government Bill which was introduced into Parliament shortly afterwards and with slight amendments became law in that year, it being enacted that its provisions should come into operation on the first of June, 1934 (*w*).

The Act has the great merit that it relieves that part of the law which deals with the constitution and general powers of local authorities from the charge of being chaotic and unscientific. Nevertheless the Act is not a piece of pure consolidation, for it inevitably makes some changes in the previously existing law, if only for the purpose of producing uniformity. The Chelmsford Committee explained the reasons for this as follows :

“ The large volume of amendments necessary to produce a single code is due not merely to the fact that the main types of local authorities—county councils, borough councils, and urban and rural district councils—are governed by different statutes, but also to the fact that these statutes differ widely in their language and are drafted on different principles. Thus the Public Health Act, 1875, imposes on urban and rural sanitary authorities definite powers and duties relating to public health, and the general provisions of that Act (that is, those conferring power to incur expenditure, acquire land, borrow money, employ staff and so forth) are strictly limited to the discharge of those

(*v*) Cmd. 4272/1933.

(*w*) Local Government Act, 1933, § 308.

powers and duties. As a consequence, in every subsequent statute conferring or imposing on urban and rural district councils fresh powers or duties (*e.g.* housing) fresh general provisions have had to be inserted, though this has usually, but by no means always, been done by reference to the Public Health Acts. On the other hand, the general powers conferred on municipal corporations by the Municipal Corporations Act, 1882, cover the whole of the activities of the corporation as such acting through the council of the borough, but, broadly speaking, do not extend to the council when discharging statutory functions such as those relating to public health, housing and the like. The Local Government Act, 1888, the latest and in its language by far the most modern of the three codes, proceeds on yet a different principle, since its general provisions cover all the activities of a county council whether conferred by the Act itself or by subsequent statutes" (x).

In drafting its Bill the Committee therefore in general followed the principle of the Act of 1888, producing a uniform constitutional code for local authorities and providing them as far as possible with a framework of general powers, such as powers relating to the employment of officers, the provision of office accommodation, the acquisition of land, the enactment of bye-laws, the promotion of private Bill legislation and finance, which may be of use in carrying out the duties imposed upon them by whatever statute they may be required to carry into effect.

In the second place, as a result of the labour of the same Committee, a large part of the legislation relating to public health has been consolidated with some amendment in the Public Health Act of 1936 and the Food and Drugs Act of 1938. A similar movement for a reformed presentation of the law of local government services has been going on for some years. Instances of this activity are already to be found in the Poor Law Act, 1930, the Town and Country Planning Act, 1932, the Housing Act, 1936, the Food and Drugs Act, 1938, and the Fire Brigades Act, 1938, while further measures consolidating the remainder of public health and the law of highways are understood to be contemplated.

(x) Interim Report, Cmd. 4272/1933, para. 8.

Modern System of Local Government.—At the outbreak of war in 1939, there were, therefore, both the beginnings of a consistent code of local government law and a uniform hierarchy of local authorities constituted in accordance with uniform principles and upon whom Parliament is able to cast new duties and new powers as the occasion for new services arises. At last, it was thought, local government had been rationalised, and a logically consistent picture of its principles could be drawn. With limitations, which were not then apparent, this was true. Broadly speaking we can take the map of England and say that, for the purpose of local administration, it is divided into counties each governed by an elected county council. In turn each county is divided into urban and rural county districts, the former being governed either by councils of non-county boroughs or by urban district councils; while the latter are administered by rural district councils. Rural, but not urban, districts are subdivided into parishes with the organisation of parish meetings or parish councils as the smallest local authorities within the scheme. Outside the county organisation and free from the control of the county council, stand those great municipalities which have been given the position of county boroughs, their councils combining the functions and powers of a borough and urban district council with those of a county council (y). Moreover one may go further and say that in matters of election, rating and many kindred subjects general principles are applicable to all local authorities. In this the example set by the reformed boroughs has been followed, and English local government has become “municipalised.”

Two principles may be discerned at work in the modern scheme of local authorities. In the first place, the organisation is hierarchic. The rural parish has a few minor powers but is generally unimportant. Subject to that exception, the county council and the district councils have between them all the powers of local government within the administrative county. Neither is, however, complete in itself. Similarly areas do

not overlap : the county is divided into districts, the rural districts are divided into parishes, and the boundaries of the lesser authority do not cross those of the greater one within whose area it wholly lies. The county borough, though excluded from the county organisation, is, moreover, capable of being fitted into this general scheme ; for, to put the matter mathematically, it is itself, within the area over which it extends, equal to the county plus the district.

Secondly, in general these local authorities are simply bodies capable of being used by Parliament for the administration of any services, nor are their constitutions or general powers inseparably bound up with the performance of some one particular function. They are, as it were, versatile and generally handy tools capable of being put to one use to-day and another to-morrow without the necessity for any adjustment of their mechanism. They are general or "*omnibus*" authorities and the powers and duties conferred upon them must be sought rather in statutes creating new services than in the Act governing their own composition. Thus it is possible for Parliament to alter the incidence of particular functions without affecting the general scheme of local government in the country. The Local Government Act of 1929 showed markedly what may prove to be a general tendency to enlarge the areas of local administration by shifting many services from the smaller to the bigger authorities. The county and the county borough are growing in importance at the expense of the non-county borough and the urban and rural district councils.

This tendency is the result of a realisation that a too rigid adherence to the hierarchy of general local authorities, through aiming at logical symmetry and uniformity, may lead to inconvenience and lack of efficiency. There is even a hint that the pendulum, having completed its swing in favour of the "*omnibus*" authority, may be starting to return to the re-introduction of the *ad hoc*. Complaint is made that areas, based on historical accidents or designed for public health administration, are not necessarily best adapted to the successful

control of such matters as town and country planning (z). Already the Land Drainage Act, 1930, and the Road Traffic Act, 1930, in so far as it creates Traffic Commissioners as licensing authorities, may be regarded to a small extent as beginning the new creation of *ad hoc* authorities, while the Unemployment Act, 1934, creating the Unemployment Assistance Board, and the Trunk Roads Act, 1936, transferring certain important through traffic highways to the direct control of the Minister of Transport, may be considered as curtailing the limits of local government in favour of centralisation. But faith in the capabilities of local authorities is not lacking. It is sufficient to mention that by the Air-Raid Precautions Act, 1937, a most important factor in the system of national defence has been entrusted to local authorities. Perhaps in the end the whole process may appear rather as a re-arrangement of services between the Central Government and the local authorities than as a limitation of the field of local government.

The Future.—This tendency towards the enlargement of local government areas, which may mark the beginning of a new period, has received a decided stimulus as a result of the war. A determination has become apparent to secure, partly by means of changes in local government structure, a general improvement in the standards of the social services and particularly some of those administered by local authorities. The Education Act, 1944, is the first result of this determination, and paves the way for a general reform and improvement of the education service, whilst incidentally concentrating all functions in the county and county borough councils. Similar proposals have appeared in the White Paper on "A National Health Service" (Cmd. 6502 of 1944), and in relation to the police and fire services, the latter partly as the result of the war-time nationalisation of the local fire services. Under the

(z) See W. A. Robson, *The Development of Local Government*; H. Finer, *English Local Government*. And see now the Town and Country Planning (Interim Development) Act, 1943, under which local authorities may be required to form joint committees for the purpose of preparing planning schemes.

Food and Drugs (Milk and Dairies) Act, 1944, certain functions of local authorities in relation to the conditions under which milk is produced on the farm are to be transferred to the Minister of Agriculture and Fisheries, and whilst this is only a small matter, it may be a pointer to the future. What may result from the present political situation remains to be seen.

Furthermore, a general review of local government areas is to be instituted under the Local Government (Boundary Commission) Act, 1945, which may result in the disappearance of some of the smaller urban and rural districts and the transfer of additional areas to some of the larger authorities. Lastly, a body new to local government, the divisional executive, has been created by the Education Act, 1944, and has already been quoted as a model for adoption in connection with the proposed national health service.

Central Control.—No sketch of the development of local government in the nineteenth and the twentieth centuries would be complete which did not give some attention to the growth of central administrative control ; to the tendency in other words towards centralisation. As we have seen, the poor law as reformed under the Act of 1834 came under the most complete central control, but attempts to impose such a system on public health failed, and resort had to be had to a more indirect and subtler method. On these latter lines central control of other services has developed, so that now in almost every branch of local government we have to inquire, not only what is the local, but also what is the Central Authority, and to distinguish the powers of the former from the control exercised over their performance by the Central Department charged with their supervision.

Ministry of Health.—The Central Departments which thus have to be considered in connection with local government are the Ministry of Education with powers of supervision (which have been greatly enlarged by the Education Act, 1944) over public education, the Home Office concerned

with police, the Ministry of War Transport dealing with electricity, highways and transport services, the Ministry of Agriculture and Fisheries with diseases of animals and some other services connected with agriculture, and pre-eminent over all other matters the Ministry of Health. This last Department cannot be dismissed by the mere mention of its name. It exercises varied and, in some cases, minute powers of controlling almost all the activities of local authorities, and is appealed to by them upon every occasion of doubt or difficulty. As we have mentioned before there was no central administrative control over local government in the eighteenth century, and the first definite creation of a central authority took place on the reform of the poor law in 1834. That Act set up a body of Poor Law Commissioners with such autocratic powers that its members became known as "the Three Kings of Somerset House" or "the Pinch-pauper Triumvirate." Great outcry arose against them, partly for political reasons, and partly because of the inevitable unpopularity of the measures they had been created to introduce. Being Civil Servants they were precluded from answering the complaints made against them, and, as no Minister was specifically charged with the supervision of their work, no effective reply could be made in Parliament (*a*). In 1847 (*b*), in consequence, the Commissioners were replaced by a Poor Law Board under a parliamentary President, but there was no diminution in the powers transferred to their successors.

The Ministry of Health, however, can trace its origins to a date still earlier than 1834. In 1831 there was a serious threat of cholera and the Privy Council set up a Central Board of Health to issue proclamations and advise the temporary local boards of health which were created in urban centres. In 1848 the Public Health Act set up a new General Board of Health, designed to possess the same wide powers of control as had rendered the activities of the Poor Law Commissioners

(*a*) See Bagehot, *The English Constitution*, 7th Edn. (1894), pp. 189-190. An interesting parallel in more modern times is the creation of the Unemployment Assistance Board by the Unemployment Act, 1934.

(*b*) Poor Law Board Act, 1847.

successful, however unpopular they might have become in their exercise. But it was one thing to admit that this was the only way of saving the poor law from degenerating into a danger to the national finances, and an entirely different thing to ask for the same central powers over a new service, which appeared likely to have little financial effect on the country as a whole. The attempt led to great opposition in Parliament and outside, and the Board was allowed to lapse in 1854 and a new Board was kept in existence temporarily until 1858, when its powers were divided up between the Home Office and the Privy Council (c).

In 1871 (d) these scattered powers of control were gathered up by the creation of the Local Government Board under a parliamentary President, to which were transferred the powers of the Poor Law Board, the Public Health Department of the Privy Council and the Local Act Branch of the Home Office. Poor law and public health thus in 1871 came under one central control, though they were not to unite locally until the Local Government Act of 1929. Henceforward there was one Central Department for the general mass of work done by local authorities. Finally in 1919 the Local Government Board was abolished and replaced by the Ministry of Health (e), the present Central Authority, and it is some indication not only of the extent of the powers wielded by that authority, but also of the importance of local government generally, that the Minister of Health in modern practice is one of the more important of Cabinet Ministers.

(c) Local Government Act, 1858.

(d) Local Government Board Act, 1871.

(e) Ministry of Health Act, 1919.

CHAPTER II

LOCAL AUTHORITIES

It is necessary at the outset of a work on local government to have a clear understanding of the local authorities through whose agency administration is carried on. Not only are the local authorities the units, as it were, with which the law of local government concerns itself, but at the present day any attempt logically to discuss that branch of the law must approach the subject through a consideration of the institutions upon which it confers rights and powers or casts duties. Hence in this chapter there will be undertaken a more detailed exposition of the present day local authorities than was possible in a merely historical introduction.

Administrative Areas.—For the purposes of local government England and Wales are divided in the first place into county boroughs and administrative counties. County boroughs are not sub-divided for local government, their councils alone exercising the sum total of powers within their boundaries. Administrative counties are, however, divided into smaller areas, called county districts. These second-rank areas are classified as urban and rural and are administered by separate local authorities. Urban county districts are, as their name implies, towns, and are governed either by borough councils, in which case they are called non-county boroughs in order to distinguish them from the county boroughs, or by urban district councils. Rural county districts consist of groups of villages, and are governed by rural district councils. Rural, but not urban, county districts are in turn divided into rural

parishes equipped with local government machinery in the form of parish meetings and parish councils (a). It will be seen that the organisation of local government falls into two distinct systems. The unitary system employed in county boroughs means the concentration of powers in one single authority, while the system in force in administrative counties results in a division of powers between two or even three classes of authorities.

Modern Local Authorities.—Since in matters of internal organisation the reformed municipal corporation has largely formed the model upon which the other authorities have been framed, it might be convenient to start with a consideration of municipal authorities, passing later to county, district and parish councils and parish meetings. Or again it might be thought more logical if local authorities were discussed in order of increasing importance and size, commencing with parishes, and ascending through county districts, non-county boroughs—since the latter are in many respects in a position identical with districts—to counties and county boroughs. The principles of municipal organisation are, however, in some ways so distinct from those upon which other authorities are based that this order would involve considerable repetition, since the constitutions of both county and non-county boroughs are governed by identical provisions formerly contained in the Municipal Corporations Act, 1882. On the whole therefore a compromise must be effected between strict logic and convenience, and a clear line will be drawn between those authorities which before June 1934 were not directly subject to the Municipal Corporations Act, 1882, and those which were. Thus the non-municipal authorities will be dealt with in order of size beginning with the smallest, the parish, and leading through the county district to the county. Then municipal organisation will be considered with the necessary distinctions drawn between non-county and county boroughs.

(a) Local Government Act, 1933, § 1.

1. The Parish.—For purposes of local government the whole of England and Wales is divided into civil parishes, defined as places for which, before the 1st April, 1927, a separate poor rate was, or could be made, or a separate overseer was, or could be appointed (*b*). That is, civil parishes are the old poor law parishes first constituted local government areas by the Tudor highway legislation and the Poor Relief Act of 1601 (*c*). Originally the civil or poor law parish was generally co-terminous with the ecclesiastical parish, but as the result of two influences it has happened that by 1921 only about six thousand of the thirteen thousand odd civil parishes were identical with the ecclesiastical. These changes have been brought about on the one hand by the enlargement of the number of ecclesiastical parishes, and on the other hand by the alteration, under various Acts of Parliament, of the boundaries of civil parishes. Modern statutes have not been concerned so much with producing identity of areas between the civil and the ecclesiastical parish, as with preventing the area of the former from cutting the boundaries of the county district and county in which it lies (*d*).

Urban Parishes.—Civil parishes must be distinguished according as they are urban or rural. The former are parishes comprised within the boundaries of boroughs or urban districts, while the latter are parishes lying within the areas of rural districts (*e*). The growth of new elected local authorities during the nineteenth century meant the gradual stripping of power from the old parochial vestries. Urban parishes remained rating areas until 1927, when the Rating and Valuation

(*b*) Rating and Valuation Act, 1925, § 68. The reference to the date, the 1st April, 1927, relates to the coming into force of this Act, by which a new scheme of rating and valuation was made to supersede the older system of rating based on the poor rate levied by parishes: see below, p. 153. The Local Government Act, 1933, does not contain a definition of the word "parish," but provides that subject to any alteration of boundaries, etc., the parishes it refers to shall be the urban and rural parishes in existence at its commencement: § 1 (2) (*f*).

(*c*) See above, p. 17.

(*d*) *E.g.* Local Government Act, 1894, § 36 (1), now repealed, Local Government Act, 1933, 11th Schd. There are now about 11,240 civil parishes

(*e*) Local Government Act, 1933, § 1 (2) (*f*).

Act, 1925, came into force. In addition urban vestries retained until 1934 a few minor powers of little practical importance (*f*). The Local Government Act of 1933, however, finally completed the destruction of the urban vestry as a local authority by transferring to the council of the borough or urban district all its functions except those of an exclusively ecclesiastical or charitable nature (*g*). Already, however, while urban parishes still retained the machinery necessary for rate collecting, there had been a tendency to amalgamate them so that there should be but one civil parish within each urban authority's area, thus simplifying the machinery of rating and to a certain extent foreshadowing the changes made by the Act of 1925.

Rural Parishes.—In rural parishes the vestry died an earlier death, its powers, except in so far as they related to the affairs of the church or to ecclesiastical charities, having been taken away by the Local Government Act, 1894 (*h*).

Parish Meeting.—Rural parishes, however, are not the empty divisions of areas which are all that their urban counterparts now remain. The Local Government Act of 1894, in an attempt to increase the political effectiveness of rural life, gave to rural parishes both local government functions to perform and an organisation with which to undertake them. In every rural parish that Act set up a parish meeting and in some a parish council as well (*i*). The parish meeting is composed of all the local government electors for the parish (*j*) and must hold its "annual assembly" every year in March, while if there is no parish council in the parish it must hold at least a second assembly in each year (*k*).

In a rural parish where there is a parish council the chairman

(*f*) See the Chelmsford Committee's Interim Report, Cmd. 4272/1933, paras. 16-18.

(*g*) § 269.

(*h*) And transferred to the parish council, if any, or to the parish meeting; § 6 (amended by the Local Government Act, 1933, 11th Schd.) and § 19 (4).

(*i*) Local Government Act, 1894, § 1; see now Local Government Act, 1933, § 43.

(*j*) Local Government Act, 1933, § 47. As to the local government franchise, see below, p. 93.

(*k*) *Ibid.*, § 77, and 3rd Schd., Part VI, para. 1 (1) and (2).

of the council is entitled to preside at parish meetings, while if there is no parish council the parish meeting annually chooses a chairman (*l*).

Parish Council.—This parish meeting is the minimum organisation existing in all rural parishes. But some rural parishes have in addition a parish council. If the population of the parish according to the latest census amounts to three hundred or more there must be a parish council. In the case of smaller rural parishes below this limit of population there is no such necessity, but, on the resolution of the parish meeting to that effect, the county council must by order establish a parish council where the population is two hundred or more, while if the population is less than two hundred the county council may at its discretion make such an order (*m*).

This is not the whole of the control exercised by the county council over the organisation of rural parishes. It may under § 45 of the Local Government Act, 1933, group small parishes together for the purpose of being administered by one parish council, or it may divide large parishes into wards, each electing separate members to the parish council of the whole parish (*n*). Copies of all orders made by the county council must be sent to the Home Secretary and the Minister of Health, in order that they may be kept informed of the changes in the constitution of rural parishes throughout the country (*o*).

The members of a parish council are normally elected by the parish meeting. But the Local Government Act, 1933, for the first time permits parish councillors to be elected by what may appear to be the more dignified system applicable to the election of the councillors of other authorities (*p*). This

(*l*) Local Government Act, 1933, § 49, and 3rd Schd., Part VI, para. 3.

(*m*) *Ibid.*, §§ 43 and 296. Power is also given to the county council at its discretion to dissolve parish councils where the population falls below two hundred and the parish meeting so resolves: *ibid.*, § 44.

(*n*) *Ibid.*, §§ 52 and 78.

(*o*) *Ibid.*, § 56.

(*p*) Elections have been suspended during the war by the Local Elections and Register of Electors (Temporary Provisions) Act, 1939, as extended from year to year until March 31, 1945, but provision has now been made, in the Representation of the People Act, 1945, for their resumption.

change may be effected in any particular case by an order made by the county council at the request of either the parish council or the parish meeting (*q*). Parish councillors hold office for three years, all retiring together. The council consists of from five to fifteen councillors the actual number being fixed by the county council (*r*), and annually elects its own chairman from among its members or from other persons qualified to be elected as councillors (*s*).

Relation between Parish Council, Parish Meeting and Electors.—In every rural parish there is a parish meeting which must meet at least once a year, and in the bigger parishes there is also a parish council elected by the parish meeting. But the Legislature seems to have distrusted to some extent the bodies it thus created, and a curious system exists under which in some cases an appeal may be made from the parish council to the parish meeting and from the parish meeting to the general mass of local government electors of the parish. Thus where a parish council exists the parish meeting is not entirely confined in its activities to electing the councillors and discussing and passing resolutions it has no power to carry into effect. In some cases the acts of the parish council are not valid unless they have been approved by the parish meeting, as for instance when the council determines to undertake any expenditure financed by loan (*t*).

Similarly there may be an appeal from the parish meeting to the electors. The decisions of a parish meeting are come to by show of hands, but a poll of the parish may be demanded at the meeting, in general by any five electors or one-third of those present at the meeting, whichever is the less (*u*).

Parish Council and Representative Body of the Parish.—Lawyers have always found it difficult to recognise that property can be vested in a fluctuating group of persons,

(*q*) Local Government Act, 1933, § 51.

(*r*) *Ibid.*, § 50.

(*t*) *Ibid.*, § 193.

(*u*) *Ibid.*, 3rd Schd., Part VI, para. 5.

(*s*) *Ibid.*, § 49.

and one device designed to overcome this difficulty has been the incorporation of the group, thus setting up in the eye of the law another person, distinct from the group of which it is composed, not affected by the fluctuations of its membership, immortal though composed of mortal men, and signifying its acts by the ceremony of affixing its common seal. This device of incorporation has been utilised freely in the creation of local authorities, including even the institutions of the rural parish ; but in the case of parishes some peculiarities in the application of the doctrine are to be observed. A parish council is incorporated (*v*). A parish meeting on the other hand is not incorporated, but, where there is no parish council, property is vested in " the representative body " of the parish, consisting of the chairman of the parish meeting and the member or members of the rural district council elected by the parish, who together are incorporated (*w*). If there is only one rural district councillor and he is also the chairman of the parish meeting, a local government elector appointed by the rural district council is the second member of the representative body of the parish. But the law, in an attempt perhaps to inculcate the idea of economy into the minds of the administrators of the smallest of local authorities, does not grant either the parish council or the representative body of the parish a common seal. In the case of a parish council its acts may be sufficiently signified under the hands, or if a seal is required, under the hands and seals of two members of the council (*x*). Similarly the acts of the representative body of the parish may be signified under the hands, or under the hands and seals of the persons for the time being composing it ; while if it is necessary to signify the acts of a parish meeting the law provides for similar authentication by the person presiding at the meeting and two other local government electors present at the assembly in question (*y*).

Functions of Rural Parishes.—Rural parishes have only minor functions as local authorities, though where a parish

(*v*) Local Government Act, 1933, § 48.

(*x*) *Ibid.*, § 48.

(*w*) *Ibid.*, § 47.

(*y*) *Ibid.*, § 47.

council exists there are slightly larger powers than in the case of a parish governed only by its parish meeting. These functions relate to footpaths, parish property such as village greens, water supply, baths, bathing places and washhouses, recreational facilities, and allotments, the suppression of nuisances and the provision of mortuaries and offices (*z*). Their powers of appointing officers are narrow and are not in any case compulsory. Parish councils may appoint one of their members to be their clerk or their treasurer but without remuneration, or they may appoint "some other fit person" to the office of clerk and may pay him a reasonable remuneration (*a*). In addition certain Adoptive Acts, relating to lighting, the provision of libraries, etc., may be adopted in rural parishes (*b*); but, even where there is a parish council, it is only the parish meeting which has the powers to bring these Acts into force within the parish (*c*).

Parishes have for the purpose of carrying out their duties limited powers of expending money derived from the rates, and may in some cases, with the consent of the county council and the Minister of Health, borrow money for capital expenditure (*d*). Perhaps the most important function of parishes however is one only indirectly conferred upon them. Rural district councils are permitted by § 88 of the Local Government Act, 1933, to delegate to parish councils their duties exercisable within the parish boundaries, and when this course

(*z*) The powers are contained in Local Government Act, 1894, §§ 6 to 8, 10, 13, 14 and 16 (as amended by the Local Government Act, 1933, 11th Schd., and the Public Health Act, 1936, 3rd Schd.); the Small Holdings and Allotments Act, 1908, Part II; the Local Government Act, 1933, §§ 127, 128, 167 to 170, and 305 (as amended by the Public Health Act, 1936, 3rd Schd.); the Public Health Act, 1936, §§ 125, 198, 230 and 260; and the Physical Training and Recreation Act, 1937, § 4.

(*a*) Local Government Act, 1933, § 114.

(*b*) The Parochial Adoptive Acts are the Lighting and Watching Act, 1833, the Burial Acts, 1852 to 1885, the Public Improvements Act, 1860, and the Public Libraries Act, 1892. Until their repeal by the Public Health Act, 1936, 3rd Schd., the Baths and Washhouses Acts, 1846 to 1925, were included among the Parochial Adoptive Acts. Now, however, the provisions of the Public Health Act, 1936, relating to these matters have been made directly applicable to rural parishes possessing a parish council: Public Health Act, 1936, § 230.

(*c*) Local Government Act, 1894, § 7.

(*d*) Local Government Act, 1933, §§ 193 and 195.

is adopted the parish council acts as the agent of the district council.

The experiment undertaken by the Act of 1894 in setting up an organisation for local government purposes within rural parishes has not, on the whole, been successful, though there appears to be a revival of interest in this form of local government. At the least they serve as a means of ventilating local complaints and so of keeping the rural district and county councils informed of parochial demands.

2. The County District.—County districts are distinguishable into urban and rural, and, though the direct creations of the Local Government Act, 1894, they are based on the earlier organisation of urban and rural sanitary districts set up by the Public Health Acts of 1872 and 1875. The former were composed of boroughs and the areas administered by improvement commissioners created by local Acts and by local boards of health. The rural sanitary districts however were simply the remainder of the poor law unions regarded as sanitary areas and governed for public health administration by the guardians. Some changes have been made in the scheme of the Public Health Acts, on the one hand by the erection of the largest municipalities into county boroughs by the Local Government Act of 1888, and on the other hand by provisions first introduced by the Local Government Acts of 1894 and 1929. Urban districts now are the areas governed by urban district councils, which have replaced improvement commissioners and local boards of health, retaining their predecessors' powers, but uniformly organised. Rural districts are administered by rural district councils, made separate entities from the now defunct boards of guardians by the Act of 1894 (e).

(e) It is important to note a simplification of terminology introduced by the Local Government Act, 1933. Under the Local Government Act, 1894, § 21, the expression "district council" included not only the councils of urban and rural districts but also non-county borough councils. This definition frequently led to confusion, since non-county boroughs were governed as to their constitution by the Municipal Corporations Act, 1882, while urban and rural district councils were differently organised under the provisions of the Local Government Act, 1894. To prevent this confusion from arising in the future the Local Government Act of 1933 is careful to distinguish non-county borough councils from urban district councils,

Urban and Rural District Councils.—County districts, other than non-county boroughs which are separately considered in connection with municipal organisation, are uniformly constituted for administrative purposes, whether they rank as rural or urban. In the one case the local authority is a rural district council, while in the other it is an urban district council; but, though their powers differ, in either case the council consists of a chairman and councillors (*f*). The councillors are elected for periods of three years, the Act envisaging that in normal circumstances one-third of their number shall retire annually (*g*). But this arrangement, whereby one-third of the councillors is elected in every year, may be altered, for, if a district council passes a resolution to that effect by a two-thirds majority, the county council may, if it considers the proposal expedient, make an order providing that the whole number of district councillors shall retire simultaneously, so that an entirely new council may be elected in every third year (*h*).

The chairman of a district council is elected annually by the councillors, and must either already be a councillor or be eligible for election as a councillor. He presides over the deliberations of the council and is *ex officio* a justice of the peace for the county in which the district is situated (*i*).

A district council must hold at least four meetings in every year (*j*). The council is a body corporate, and has the dignity of a common seal (*k*).

by providing that the expression “‘district council’ means an urban district council or a rural district council” only, while the subordination of non-county boroughs to the county council’s control is emphasised by re-enacting that the expression “‘county district’ means a non-county borough, urban district or rural district”: § 305. Hence urban districts are county districts other than non-county boroughs and rural districts: § 1 (2) (*d*).

(*f*) Local Government Act, 1933, §§ 31 and 32.

(*g*) Elections have been suspended during the war by the Local Elections and Register of Electors (Temporary Provisions) Act, 1939, as extended from year to year until March 31, 1945, but provision has now been made, in the Representation of the People Act, 1945, for their resumption.

(*h*) Local Government Act, 1933, § 35; and such orders may be rescinded by the county council.

(*i*) *Ibid.*, § 33, and 3rd Schd., Part III, para. 3.

(*j*) *Ibid.*, 3rd Schd., Part III, para. 1.

(*k*) *Ibid.*, §§ 31 and 32.

Functions of District Councils.—The functions of district councils, as might be expected from their historical origins, are primarily sanitary : that is, district councils are pre-eminently public health authorities, and the main difference between rural and urban district councils is to be found here, for the former, not being opposed to the acute sanitary problems raised by thickly populated areas, have slightly less wide powers than their urban counterparts. Hence, too, every district council must employ a medical officer of health and a sanitary inspector (*l*), and provisions are contained in the Act of 1933 (*m*) for ensuring that arrangements shall be made for enabling every district council to employ a medical officer of health who is restricted from engaging in private practice. This desirable result may be brought about in consultation with the county council by combining for this purpose two or more districts where they are each too small individually to employ a whole-time medical officer. In addition to these public health officials every district council must appoint a clerk and a treasurer and is empowered to appoint other officers, an urban district council being also required to appoint a surveyor (*n*).

The acceptance in the latter part of the nineteenth century of the principle that uniform general local authorities were preferable to *ad hoc* bodies, led to district councils also becoming local authorities for services other than public health. Until recently they were in general highway authorities, though the Local Government Act of 1929 has, as part of its policy of favouring the larger areas of administration, transferred to county councils the greater part of their highway powers. Now under the Rating and Valuation Act, 1925, urban and rural district councils are rating authorities, and have duties to perform relating to the valuation of property and the making and levying of rates. Under many other Acts district councils are utilised as local authorities for the particular services dealt with, and § 274 of the Local Government Act,

(*l*) Local Government Act, 1933, § 107.

(*m*) § III, replacing the provisions first contained in the Local Government Act, 1929, § 58.

(*n*) Local Government Act, 1933, § 107.

1933, contains an important provision, empowering county councils to employ district councils as their agents for the conduct, with certain exceptions, of any county business (*o*).

3. The County.—The administrative county does not necessarily coincide with the geographical county in area. In the first place, any county boroughs lying within the geographical county are excluded from the administrative county, since they are governed exclusively by their own councils and are under no form of subordination to the county council. Secondly, the Local Government Act of 1888, which created county councils, transferred to them the administrative work previously performed by the justices in quarter sessions (*p*). County councils are thus the successors of the justices and their boundaries consequently follow those determining the justices' jurisdiction, which had to take account of certain ancient franchises and liberties. For example the Isle of Ely, the Soke of Peterborough, the three Ridings of Yorkshire and the three Parts of Lincolnshire are each administered by their own separate county councils (*q*).

The County Council.—The Act of 1888 modelled the organisation of a county council closely on that of the council of a borough under the Municipal Corporations Act, 1882 ; indeed with some slight modifications §§ 2 and 75 of the Local Government Act, 1888, expressly applied to county councils the provisions of the Act of 1882. Under the constitutional code of local authorities contained in the Local Government Act of 1933 it is no longer necessary to legislate thus by reference. The county council is composed

(*o*) The exceptions are (*a*) any matter for which the county council is required by statute to appoint a committee (*e.g.* education), (*b*) any matter which the county council is specifically empowered by statute to delegate to district councils (*e.g.* the maintenance of highways under the Local Government Act, 1929, § 35), and (*c*) financial powers. In respect of these limitations the section restricts the operation of the former power conferred by the Local Government Act, 1894, § 64, which extended to "any" county business.

(*p*) Local Government Act, 1888, § 3.

(*q*) There are thus sixty-one administrative counties in England and Wales, excluding London. Their names are set out in the Local Government Act, 1933, 1st Schd., Part I.

of a chairman, county aldermen and county councillors (*r*). Unlike the district or parish council, the members of the county council, apart from the chairman, are divided into two classes distinguished from each other only as to numbers, method of election and tenure of office. Whereas three-quarters of the council consists of councillors, one-quarter is composed of aldermen : that is, the number of aldermen amounts to one-third of the number of councillors (*s*). The county councillors are directly elected by the local government electors for periods of three years and retire simultaneously (*t*). The county aldermen, on the other hand, hold office for six years, one-half of their number retiring every third year with the councillors (*u*). But the aldermen do not come into direct contact with the electorate : they are elected by the councillors. Consequently every third year, at the first meeting after the election of new county councillors, the latter fill the places of the retiring aldermen (*v*). Aldermen must be elected from among the councillors or persons eligible for election as councillors (*w*).

The chairman of the county council is elected annually by the whole council, aldermen as well as councillors, and he must himself either be already a county councillor or county alderman or be eligible for election as a councillor. During his year of office the chairman presides at the meetings of the council, he is *ex officio* a justice of the peace for the county and may be paid a reasonable remuneration for his services (*x*).

County councils dealing with wide and scattered areas conduct most of their business through the agency of committees, and the law only requires council meetings to be held four times a year (*y*).

(*r*) Local Government Act, 1933, § 2.

(*s*) *Ibid.*, § 6.

(*t*) *Ibid.*, § 8. Elections have been suspended during the war by the Local Elections and Register of Electors (Temporary Provisions) Act, 1939, as extended from year to year until March 31, 1945, but provision has now been made, in the Representation of the People Act, 1945, for their resumption.

(*u*) *Ibid.*, § 6.

(*v*) *Ibid.*, § 7.

(*w*) *Ibid.*, § 6. Election as an alderman causes a councillor to vacate his office of councillor.

(*x*) *Ibid.*, §§ 3 and 4, and 3rd Schd., Part I, para. 3.

(*y*) *Ibid.*, 3rd Schd., Part I, para. 1.

Functions of County Councils.—It is impossible to summarise accurately the multitudinous functions of county councils. As has been said above, the policy of recent legislation is to favour the administration of local government services through the larger authorities, and in consequence the powers of county councils are increasing. In some matters they act directly as the sole local authority for the whole area of the county ; thus they are authorities for the poor law, certain agricultural and special health services, education and, with some slight exceptions in the case of the larger boroughs or urban districts, for police. Similarly they are highway authorities with further exceptions in favour of the Ministry of War Transport and boroughs and urban districts. In other matters they act only in a supervising capacity ; for instance controlling the activities of district councils in public health, and having wide powers of altering the boundaries of county districts and parishes (z). In other matters again they have powers concurrent with those possessed by district councils, it being left to either class of authority to undertake the provision of such services. In this class fall such matters as river pollution, and certain health services.

Standing Joint Committee.—The county police force is, however, in an anomalous position. The police system is not only a service of local government ; it is still intimately connected with the administration of justice, and on the transfer of the administrative functions of quarter sessions to county councils it was felt that the control of the justices over the county police could not entirely be relaxed. Consequently the police authority in counties is not the county council itself, but the standing joint committee whose members are appointed in equal numbers by the county council and the justices in quarters sessions (a).

(z) See now, however, the Local Government (Boundary Commission) Act, 1945, referred to below at p. 75.

(a) Local Government Act, 1888, §§ 9 and 30. Under the Defence (Amalgamation of Police Forces) Regulations, 1942, certain county and borough police forces have been temporarily amalgamated for war-time purposes, and in these cases special provision has been made for the representation of the authorities whose forces have been amalgamated.

Officers.—The most important officer that a county council is required to appoint is its clerk (*b*), and the procedure to be adopted in his appointment is governed by peculiar provisions which can only be understood by a glance at the history of county government. Before the Local Government Act of 1888 as the justices of the peace assembled in quarter sessions performed both judicial and administrative duties, the clerk of the peace acted both as the clerk of the court and as the clerical officer of the justices when engaged in local government. When the Act of 1888 transferred the administrative business of quarter sessions to the county councils which it set up, it was felt desirable that the business of both bodies should continue to be under the supervision of the same chief officer. Consequently the Act required that the same person should hold both the offices of clerk to the county council and of clerk of the peace, and provided for his appointment by the same standing joint committee which is the police authority for the county (*c*). With the passage of time and the increase in the functions cast by law upon county councils, the clerk's position has become overloaded. Moreover that their chief officers should be appointed by outside bodies, over whom they have no direct control, has seemed to amount to a slur upon the important position county councils have come to assume. Consequently in 1931 the Local Government (Clerks) Act separated the two offices, conferring upon county councils the right to appoint their own clerks and leaving the appointment of clerks of the peace to quarter sessions ; but the Act contained complicated provisions for ensuring that wherever possible the same person should be appointed to hold both offices. In so far as this Act dealt with the appointment of clerks to county councils it was repealed and re-enacted by the Local Government Act of 1933. Briefly the position under the combined effect of these two statutes is that the county council, in appointing a clerk of the county council, must take into account his willingness and fitness to hold the office of clerk of the peace. On

(*b*) Local Government Act, 1933, § 98.

(*c*) Local Government Act, 1888, § 83.

a vacancy occurring in the office of clerk of the peace the county council must give notice to quarter sessions stating whether the clerk of the county council is willing to accept the office. If he is willing and quarter sessions does not within a certain period appoint another person to the office, the clerk of the county council automatically becomes clerk of the peace. To secure regularity in the due observance of this procedure it is further provided that, where one person holding both offices vacates one of them, he shall automatically vacate the other as well (*d*).

In addition to its clerk a county council is required to appoint a county treasurer, a county medical officer of health, a county surveyor and other necessary staff (*e*). Under other Acts dealing with particular services it is required to appoint a variety of other specialist officers, such as a chief education officer, an inspector of weights and measures and a public analyst.

Importance of the County for other Purposes.—Before leaving the consideration of the county as an area of local government it is necessary to mention its importance for other purposes. The county organisation for local government is based on the county council, but the same area has other institutions for matters closely akin to local government.

The county is the area for the jurisdiction of quarter sessions, and is divided into petty sessional divisions usually corresponding to the ancient hundreds. It is also the district of the sheriff annually appointed by the Crown, and now shrunk in importance to little more than an officer charged with the duty of executing the writs and orders of the High Court.

When it became apparent that the sheriff, reduced to the position of an annual officer, was no longer able adequately to perform the duties of commander of the county militia, the Tudors began the appointment in each county of a lord lieutenant to take over the sheriff's military duties. At a time when no county police force existed and the justices had to

(*d*) Local Government (Clerks) Act, 1931, §§ 1, 2 and 4; Local Government Act, 1933, §§ 98-100.

(*e*) Local Government Act, 1933, §§ 102-105.

rely for the maintenance of order upon the inefficient parish constabulary, it was important that they should have easy access to the assistance of the militia. This was ensured by the practice of appointing the lord lieutenant to be *custos rotulorum*, that is, the keeper of the records of quarter sessions and chief among the county justices, and this in turn gave the lord lieutenant great influence with the Crown in the appointment of justices. With the disappearance of the militia the lord lieutenant has ceased to have a county force to command. His position has come to be largely one of great honour with no active duties to perform. He still, however, maintains his connection with military affairs by acting as chairman of the county territorial association and recommending for first commissions in that force. He is still *custos rotulorum* and with the assistance of an advisory committee submits to the Lord Chancellor the names of persons suitable for inclusion in the commission of the peace for the county.

Like the sheriff the coroners have sunk from their former important position until now they have no more important duties to perform than to hold inquests into suspicious deaths, treasure trove, etc., and their appointment was transferred from the freeholders of the county to the county council by the Local Government Act of 1888 (*f*).

4. Municipal Organisation.—To explain adequately the present position of boroughs it is necessary once more briefly to glance at their history. In the Middle Ages the boroughs grew up as urban centres freed to a greater or less extent from the control of a manorial lord and excluded from the general organisation of the county. This latter benefit they owed to charters of incorporation granted by the Crown, exempting them in varying degrees from the sheriff's jurisdiction. No uniform system was developed: the individual charter alone determined the degree of autonomy granted to the borough, varying from those which were granted the slightest exclusion to those that were even raised to the position of counties in

(*f*) § 5; Coroners (Amendment) Act, 1926, § 2.

themselves and given their own sheriffs (*g*). In later times, when the justices of the peace were growing in importance as local government authorities, many boroughs obtained the grant by the Crown of separate commissions of the peace, or even, in the counties of cities and towns, of a separate quarter sessions, thus maintaining in the presence of newer institutions their old exemption from county government.

Partly as a result of the haphazard way in which borough charters had been given, and partly as a result of the lavish creation of boroughs by the Crown for political purposes, the boroughs in general became decadent and corrupt during the seventeenth century, and in the following century this process was accelerated by the principle introduced by the Revolution, that the Central Government should not interfere in local affairs, which left the boroughs without due incentive to self-improvement. In consequence, when new problems of local government arose there was no thought of leaving their solution to the municipal corporations, but even in boroughs improvement commissioners were set up by local Acts.

Municipal Reform.—In the light of this history, the framers of the Municipal Corporations Act of 1835 confined their attentions to stamping out the possibility of corruption, and did not feel justified in greatly extending the activities of boroughs as local authorities. The Act therefore was primarily concerned with the internal organisation and corporate property of the boroughs to which it applied (*h*). It laid down a uniform plan making the town councils popularly elected. In the

(*g*) Cf. Maitland, *Constitutional History of England*, p. 52: "This is a matter of degree; at no time before the year 1835 can we say that the constitution of the various boroughs is the same throughout England, or even that it conforms to any one type. There hardly can be a history of the English borough, for each borough has its own history."

(*h*) The Act only applied originally to 178 corporations mentioned in its schedule. Other municipal corporations were left untouched by its provisions. The Municipal Corporations Act, 1883, however, dissolved all the smaller boroughs to which the Acts of 1835 and 1882 had not been applied, so that, with the exception of the City of London, a municipal borough until 1934 meant a place subject to the Municipal Corporations Act, 1882: Interpretation Act, 1889, § 15—a definition which, though no longer apt, does not seem to have been repealed by the Act of 1933.

interval between 1835 and 1882 the reformed boroughs proved themselves capable of sustaining a high standard of administration, and the great consolidating Municipal Corporations Act of the latter year governed some of the most progressive and important of local authorities.

The Municipal Corporations Act, 1882, however, still bore the marks of history. It dealt only with organisation, and conferred few powers of local government, so that a true picture of the position of boroughs as local authorities had to be sought, and indeed even after the Act of 1933 must still be sought rather in the numerous statutes setting up or regulating particular services. In this the Act of 1882 reflected the state of feeling existing in 1835, when it was thought impossible to effect more than a negative reform of the boroughs. For the same reason the Act of 1882, again reproducing the Act of 1835, had no provisions for central control (*i*), such as had so markedly characterised the Poor Law Amendment Act of 1834. Consequently the boroughs (*j*) still enjoy a degree of autonomy not found in the case of other local authorities, and it is the desire of progressive urban districts to secure incorporation as boroughs, not only for the increase in dignity, but also for the relaxation of control which will result.

Modern Municipal Corporations.—The Local Government Act of 1933, reproducing the Municipal Corporations Act, 1882, applies to all existing boroughs, with the exception of the City of London which was left unreformed by the Act of 1835 and still enjoys its mediaeval organisation (*k*). It applies to those boroughs which had obtained the dignified position of being counties of cities or towns, but not so as to take away their peculiar privileges (*l*). Some municipalities, usually the seat of a cathedral and bishop, have received the honorary title of “city,” but, except in so far as it affects

(*i*) Except in relation to the alienation of corporate property and the contracting of loans.

(*j*) Even under the Act of 1933, which does little beyond reproduce the earlier legislation with the addition, in the case of boroughs, of a framework of general powers.

(*k*) See below, p. 255.

(*l*) Local Government Act, 1933, § 301.

their proper appellation, they are in no different position from the ordinary borough (*m*). Moreover there is no possibility of future divergences from the uniform plan contained in the Act, for its provisions automatically apply to every new borough as soon as it receives its charter of incorporation (*n*).

Council of the Borough.—In considering municipal organisation we must notice a legal peculiarity distinguishing boroughs from all other local authorities. Parish, district and county councils are themselves bodies corporate, but the inhabitants of their respective areas are not incorporated by the law. On the other hand it is the mayor, aldermen and burgesses who are recognised as forming the municipal corporation (*o*), and the burgesses are simply the local government electors of the borough (*p*). Thus, in the case of boroughs, it is not the council which is incorporated, but the whole mass of the electors. This difference from the position of other local authorities is, however, more apparent than real, for the Act provides that the corporation can act only through its council, that is the mayor, aldermen and councillors (*q*).

The burgesses elect the councillors for periods of three years, so that one-third of the councillors retire annually. Therefore if the borough is divided into wards matters are so arranged that the number of councillors representing each ward is divisible by three (*r*).

(*m*) Local Government Act, 1933, § 17. This title is conferred by the Crown by letters patent, as an act of the prerogative, though it may, of course, be conferred by local Act.

(*n*) Municipal Corporations Act, 1882, § 6; Local Government Act, 1933, § 129.

(*o*) Local Government Act, 1933, §§ 17 and 129. In the case of a city, the mayor (or lord mayor), aldermen and citizens.

(*p*) Representation of the People Act, 1918, 6th Schd., para. 2.

(*q*) Local Government Act, 1933, § 17.

(*r*) *Ibid.*, §§ 23 and 25. Some boroughs are not divided into wards, when elections are held for the whole borough: § 24. The division of a borough into wards, or the alteration of the wards or of the number of councillors may be effected by Order in Council; see below, p. 81. Elections have been suspended during the war by the Local Elections and Register of Electors (Temporary Provisions) Act, 1939, as extended from year to year until March 31, 1945, but provision has now been made, in the Representation of the People Act, 1945, for their resumption. The alteration of wards has been temporarily prohibited by the same Act.

As in the case of county councils the aldermen are one-third the number of the councillors, and are elected for periods of six years, one-half of their number retiring every third year. Similarly they must already be councillors or persons eligible as councillors (*s*). But, unlike the election of county aldermen who always have been elected by the county councillors alone, borough aldermen were originally elected by the councillors together with the non-retiring aldermen (*t*). But the system applying in county councils, by which the councillors alone might elect aldermen, was extended also to borough councils by the Municipal Corporations Amendment Act, 1910 (*u*). The councillors and aldermen together annually elect the mayor (*v*) from among the members of the council or persons qualified to be elected as councillors. During office and for one year thereafter the mayor is *ex officio* a justice of the peace for the borough, and, while mayor, has precedence within its boundaries (*w*). He presides at council meetings (*x*) and may be paid a reasonable remuneration for his services (*y*), but perhaps his most important function is that of personifying the spirit of local patriotism and pride which is one of the reasons for the success of the modern borough.

Municipal Officers.—As the organ of a municipal borough the council is required to appoint a town clerk, a borough treasurer, a borough surveyor, a medical officer of health and a sanitary inspector, and may appoint such other officers as it may think fit (*z*).

The council of a borough is only required to hold four quarterly meetings a year (*a*). But in practice borough councils, like other

(*s*) Local Government Act, 1933, § 21. Election as an alderman causes a councillor to vacate his office of councillor.

(*t*) Municipal Corporations Act, 1882, § 14.

(*u*) Now the Local Government Act, 1933, § 22.

(*v*) In some of the larger cities called the Lord Mayor, the dignity being conferred by letters patent.

(*w*) Local Government Act, 1933, § 18. The mayor of a non-county borough during his year of office is also *ex officio* a justice of the peace for the county: *ibid*.

(*x*) *Ibid.*, 3rd Schd., Part II, para. 3.

(*y*) *Ibid.*, § 18.

(*a*) *Ibid.*, 3rd Schd., Part II, para. 1.

(*z*) *Ibid.*, § 106.

sanitary authorities, meet monthly. Borough councils are moreover utilised as local authorities for a multitude of other services.

County and Non-County Boroughs.—In connection with their functions as local authorities and as a result of the Local Government Act, 1888, a distinction must be drawn between county boroughs and non-county boroughs. That Act did something towards reducing non-county boroughs to the position, *vis-à-vis* the county councils, of urban districts, though it still left all but the smallest of them existing as independent police authorities. Conversely it erected the greatest municipalities into the new class of county boroughs forming separate administrative areas (*b*). These latter as to their organisation are still exclusively governed by the general law applicable to all boroughs and now contained in the Act of 1933, but by virtue of the Act of 1888 they are exempted from any subordination to the county council, and their own councils are, with some slight modifications, invested with all the powers of a county council within the boundaries of the borough. Thus the council of a county borough is, within the area of its jurisdiction, at once a borough council, an urban sanitary authority and a county council. This exclusion from the administrative county did not, however, affect the position of county boroughs in respect of other matters, such as the administration of justice, for which purposes they are still reckoned as within the geographical county (*c*). These modern county boroughs are not to be confused with the older counties of cities or towns, though many of the latter have attained to county borough rank. A borough which is in itself a county of a city or town is outside the geographical county for all purposes except the administration of modern local government services; and whether it is also outside the jurisdiction of the county council in administrative matters depends solely on whether it has been created in modern times a county borough.

(*b*) Local Government Act, 1933, § 1. The names of the 83 county boroughs are set out in the 1st Schd., Part II.

(*c*) Local Government Act, 1888, §§ 31 and 34.

The Local Government Act, 1888, constituted as county boroughs certain boroughs of a population of at least fifty thousand, and envisaged that, when other boroughs reached this size in inhabitants, they should be eligible for promotion to this exceptional class by provisional order made by the Minister of Health (*d*).

The Local Government (County Boroughs and Adjustments) Act, 1926, however, raised the limits of size and altered the procedure by which a county borough is created, and its provisions were re-enacted in the Local Government Act of 1933. As a result a borough could only attain the rank of a county borough by obtaining the passing of a private Act of Parliament, and the promotion of a Bill for that purpose was permitted only to a borough whose population amounted at least to seventy-five thousand (*e*). This narrowing for the future of the class of municipalities eligible for county borough rank occurred at the time when legislation, as typified by the Local Government Act, 1929, was already favouring an increase of powers of county and county borough councils at the expense (in the case of county councils) of district and non-county borough councils, and is part of the modern policy of increasing wherever possible the size and financial resources of the areas of administration (*f*).

Future Development.—The present organisation of local government has not gone uncriticised, even before the war. In particular the Majority Report of the Royal Commission on Local Government in the Tyneside Area (*g*) thought that there were objections to the system by which county boroughs were autonomous units of local government divorced from

(*d*) Local Government Act, 1888, § 54.

(*e*) Local Government Act, 1933, § 139, and see also the Local Government (Boundary Commission) Act, 1945, by which this figure is increased to 100,000.

(*f*) During the continuance of the Local Elections and Register of Electors (Temporary Provisions) Act, 1939, *i.e.* until February 15, 1945, no Order in Council or Order made under, or confirmed by, any Act passed before August 1, 1939, could come into operation so as to alter the areas or constitutions of local authorities. See also the Local Government (Boundary Commission) Act, 1945, referred to below at p. 75.

(*g*) Cmd. 5403/1937.

administration in the rest of the geographical counties in which they lay. Too often, it was maintained, this meant the concentration of financial strength in comparatively small areas to the impoverishment of the remainder of the county. The Majority Report accordingly suggested that the time was ripe for superseding both county boroughs and county councils by the introduction of a wider scheme of Regional Councils. These regional councils would administer services "predominantly national in character and which should be administered economically and efficiently over large areas." while "services which are local in character conferring upon ratepayers direct benefit more or less commensurate with the equivalent rate burden" should be left in the hands of subordinate borough and district councils. They admitted that it was not possible to draw this distinction between "regional" and "local" services with logical precision, but suggested for inclusion within the "regional" class the medical and allied services of public health, including mental hospitals and mental deficiency, education, public assistance, police, fire brigades and highways (except unclassified roads in urban areas). The terms of reference of the Commission, however, confined the Majority Report to recommendations relating to local government on Tyneside, and the Government did not feel able, in the absence at any rate of local unanimity, to accept recommendations for a particular area involving such fundamental changes in the general system of local government throughout the county. No doubt, however, the Report did something to focus attention upon what is rapidly becoming one of the most important problems of local administration. Thought of post-war reconstruction has, since 1942, been greatly in the minds of those concerned, not only in the Government, but also the local authorities themselves and their associations. Thus, in 1942, the Association of Municipal Corporations produced proposals for the establishment of "all-purposes" authorities, on the lines of the existing county borough councils, in substitution for the present structure of local government. This was rapidly followed by the publication of proposals from the

other local government associations, but these were of a less ambitious character. None of the proposals was, however, accepted by the Government which, at any rate up to the present time, has preferred to pursue the pre-war policy of piecemeal adjustment of functions and areas, exemplified so far in the Education Act, 1944, and the Local Government (Boundary Commission) Act, 1945.

CHAPTER III

ALTERATION OF AREAS

Necessity for Elasticity.—Before proceeding further it may be convenient to group in one place the ways in which the different local authorities which have just been discussed are created, and how their boundaries may be altered. A system of general, as opposed to *ad hoc*, local authorities suffers, if it is rigidly maintained, from the defect that areas suitable for one service, which is predominant at one time, may be totally unfitted for the administration of newer services which come to assume greater importance at another time. Similarly the alteration in the character of areas, caused by the growth or diminution of population or by the introduction of factories or the opening of mines, may mean that new arrangements of local authorities become necessary. The elasticity required to meet these problems is ensured by the provisions dealt with in this chapter. At the same time it must be noticed that no area may demand as of right its own promotion in the hierarchy of local authorities or the extension of its own boundaries. In the matter of extension, which is the more frequent problem arising, a practice has grown up defining generally the conditions which must be satisfied before an extension will be granted, whether it be Parliament or the Ministry of Health that is empowered to make the alteration. No hard and fast rules can be laid down, but certain matters will always be taken into consideration in deciding whether a claim for extension is justified. Thus community of interest between the two areas, efficiency and convenience of service, and the wishes of the inhabitants affected are of importance, as is also the question whether the inhabitants of the area sought to be included are drawing the advantages of

amenities provided by the neighbouring authority, while escaping the cost by living outside its boundaries. A new element, that of time, may have been introduced indirectly by the Local Government Act, 1929. That Act provided for periodical reviews of the boundaries of areas embraced within the administrative county (*a*), and the onus of proving the necessity of an alteration of boundaries except when these reviews are being undertaken must have been indirectly rendered more heavy. The war, however, which necessitated a postponement of the second review of county districts (*b*), transformed the situation and, following the publication of a White Paper entitled "Local Government in England and Wales during the Period of Reconstruction" (Cmd. 6579 of 1945), a new procedure has been established by the Local Government (Boundary Commission) Act, 1945.

Creation of New Authorities and Alteration of Existing Areas.—The creation of new local authorities must obviously upset the arrangements of those previously existing, and hence in most cases it is convenient to consider their creation merely as one aspect to be observed in the wider question of the alteration of the areas of existing authorities. The law itself, by the form in which it is cast, recognises this in every case except that of the municipal corporation. In this latter case the historical fact of which many boroughs are proud, that the incorporation of a borough was effected by royal charter, has served to preserve the ancient form and so to give an exceptional appearance to the creation of a new borough. It will accordingly be convenient in the first place to consider how a borough is incorporated. Broadly speaking, a municipal corporation is still created by royal charter, but there are many details of procedure to be noticed.

Creation of Municipal Boroughs.—Under the Municipal Corporations Act, 1882, the first step towards the

(*a*) See below, p. 74.

(*b*) Local Elections and Register of Electors (Temporary Provisions) Act, 1939, § 6, as extended.

incorporation of a borough was for "the inhabitant householders" of the area in question to address a petition to the King in Council praying for the grant of a charter (*c*). As in fact petitions for incorporation were in modern times invariably promoted by the local authority of the area desiring incorporation, the Local Government Act, 1933, gave legal effect to this fact, by providing for the petition to be presented by the urban or rural district council of the area; but safeguards are inserted to prevent the rash presentation of a petition. A specially summoned meeting of the district council must by a majority of the whole members of the council, pass a resolution to present a petition and after an interval of one month the resolution must be confirmed at a second specially summoned meeting by a like majority (*d*). Under the Municipal Corporations Act, 1882, district councils, though in fact they might promote petitions for incorporation acting for "the inhabitant householders," had no power to pay the expenses they incurred, and had to make use of the device of a guarantee fund raised among the inhabitants. If the petition were successful, however, the expenses might be paid by the newly created borough (*e*); while the Committee of the Privy Council to which the petition was referred might make lawful the payment of the expenses of any local authority promoting or opposing an application (*f*). The Local Government Act, 1933, by recognising directly the right of the district council to promote a petition for incorporation, seems impliedly to authorise the council to bear the expense even if it should prove to be unsuccessful; for it no longer expressly imposes on a newly incorporated borough the burden of paying for its charter, nor does it re-enact the provisions permitting the Committee of the Privy Council to authorise the promoters to pay their expenses, but confines them to a power to order the promoters to pay their opponents' expenses (*g*).

(*c*) *ibid.* 210.

(*d*) Local Government Act, 1933, § 129.

(*e*) Municipal Corporations Act, 1882, § 140 and 5th Schd.

(*f*) *Ibid.*, § 214.

(*g*) § 133.

Procedure in granting Charter.—Upon the presentation of the petition to the King in Council it becomes lawful for the Crown on the advice of the Privy Council to grant a charter of incorporation (*h*). The Act in consequence provides that the petition shall be referred for consideration to a Committee of the Privy Council. Care is taken that adequate publicity is given to the petition so that interested parties may have an opportunity of presenting their views either before the Committee of Council or locally. Notice of the presentation of the petition must be given by the promoters to the county council and the Minister of Health. Again, the Minister of Health may on the request of the Committee order a local inquiry to be held in the area to which the petition relates so that local opinion may be tested, and in practice the holding of such an inquiry is usually directed. Lastly the Committee of Council, before deciding whether to advise that the petition shall be acceded to, must give at least one month's notice of the time at which the petition will be taken into its consideration in order that all interested parties may be able to decide whether to appear and oppose or support the petition (*i*).

With the assistance of these means of obtaining information the Committee of Council must then determine whether it will advise the Crown to grant a charter. In practice it requires the petitioners to prove the suitability of the area for incorporation, considering such matters as its importance and stability, both in population and rateable value, as well as the way in which it is provided with services. In addition to these mundane particulars the Committee has sometimes taken into account such a matter as the historical traditions associated with the area, as a reason for advising the issue of a charter. In any case the Committee is required to consider any representations which may be made to it by the county council or the Minister of Health (*j*).

Scheme.—But since such matters as the relations between the new borough and existing local authorities must also be

(*h*) Local Government Act, 1933, § 129.

(*i*) *Ibid.*, § 130.

(*j*) *Ibid.*

settled, it would in practice be impossible to grant a charter immediately. Consequently, the Act provides that the Committee of Council shall settle a scheme dealing with the relation of the proposed borough with other existing authorities and providing for the transfer and adjustment *inter se* of functions, property, income, liabilities and officers (*k*). A draft scheme is either prepared by the Committee of Council or submitted by the promoters, and notice of it is required to be advertised in the *London Gazette* and locally, so that within one month thereafter interested parties may make representations relative to the draft scheme (*l*). It must also be referred to the Home Secretary and the Minister of Health, and in some circumstances to the Minister of Transport and the Minister of Education (*m*). The Committee of Council, having taken into consideration any representations it may have received, then settles the scheme and thereupon it must be again advertised in the *London Gazette* and locally. A month is then allowed to elapse during which opponents may present petitions against the settled scheme. If at the end of that period there is an unwithdrawn petition opposing the scheme and presented by any local authority or other public body affected or by one-twentieth of the local government electors of the area in question, the jurisdiction of the Committee of Council lapses, and the scheme must be confirmed by Act of Parliament (*n*). In such a case the procedure in Parliament is peculiar. The Bill to confirm the scheme is deemed to be a public Bill, but on presentation to either House of petitions against it, it is referred to a Select Committee and the opponents are heard in support of their petitions as if the Bill were a private one. If, on the other hand, no such opposition is offered, the settled scheme may, at the end of the month from gazetting and advertising, be confirmed either by Act of Parliament or by Order in Council (*o*). In either case when the scheme is confirmed, whether by Act of Parliament or by Order in Council, the

(*k*) Local Government Act, 1933, §§ 132, 148-150.

(*l*) *Ibid.*, § 132.

(*m*) *Ibid.*, § 133.

(*n*) *Ibid.*, § 132.

(*o*) *Ibid.*, § 134. For the procedure on Bills in Parliament see below, pp. 293 and 301.

Crown grants its charter incorporating the new borough (*p*), which thereupon comes under the provisions of the Act of 1933 relating to boroughs (*q*).

Charter and Scheme.—It is important to note the different functions of the charter and the scheme. The charter creates the borough : it erects the mayor, aldermen and burgesses into a body corporate, it defines the boundaries of the borough, it may determine the number of councillors and define the wards into which, for the purpose of their election, the borough is to be divided. Apart from such temporary arrangements for elections and so forth as may be necessary to set the new body in motion, it is permanent in its operation and forms the constituent document of the new municipal corporation (*r*). The scheme, on the other hand, is essentially subsidiary and deals with the external and not the internal arrangements : its function is to make the adjustments in powers, duties, property, income and liabilities of the existing local authorities necessary upon the introduction into their midst of the new borough.

During the continuance in force of the Local Elections and Register of Electors (Temporary Provisions) Act, 1939, no Order in Council or order made under, or confirmed by, any Act passed before August 1, 1939, could come into operation so as to alter the areas or constitution of local authorities. Thus, although the royal prerogative was not affected, it was not possible to make any scheme in order to bring a charter into effect and in fact the Act specified a number of alterations, etc., which it prohibited (*s*). The Act, as extended, expired on March 31, 1945.

Obsolete Powers of altering Areas.—Prior to the Local Government Act of 1933 there still remained on the Statute Book two codes of procedure for the alteration of areas, one

(*p*) The charter must be laid before both Houses of Parliament after it is granted ; Local Government Act, 1933, § 137.

(*q*) Local Government Act, 1933, § 129.

(*r*) *Ibid.*, § 131.

(*s*) Local Elections and Register of Electors (Temporary Provisions) Act, 1939, § 5, as amended by the Local Elections and Register of Electors (Temporary Provisions) Act, 1943, § 1 and Schedule.

derived from the Public Health Act, 1875 (*t*), and the other based on poor law legislation (*u*). Both were in practice obsolete, and the Local Government Act, 1933, repealed them (*v*), and simplified the law by removing from it what had for some time amounted to little more than a dead letter. The chaos of overlapping areas and intersecting boundaries, which characterised the distribution of local authorities throughout the country in the middle of the nineteenth century and which took so long to disentangle, made the Legislature careful to provide that the powers of alteration which it conferred should not be used to produce once more a similar state of disorganisation. As long ago as 1888 (*w*) a canon was laid down which is still law and must be borne in mind in considering the exercise of all the powers of altering areas dealt with in this chapter. It now forms § 153 of the Local Government Act, 1933, and is a sufficiently important statement of principle to justify its quotation in full : it runs :—

“In every alteration of boundaries effected under this Part of this Act, care shall be taken that, so far as practicable, the boundaries of an area of local government shall not intersect the boundaries of any other area of local government.”

The effect of the Local Government Act of 1933 was to consolidate several sets of provisions conferring powers to alter areas drawn in the main from legislation as diverse in time as the Local Government Acts of 1888, 1894 and 1929. The Act thus contained what was at that time felt to be a fairly satisfactory method of dealing with all kinds of changes in the areas of the different types of local authorities which were likely to occur. Nevertheless it has been felt, partly as a result of experience and partly as a result of the changes brought about by war-time conditions, that further changes were necessary,

(*t*) §§ 270–274.

(*u*) Divided Parishes and Poor Law Amendment Act, 1876, §§ 1–9; Poor Law Act, 1879, §§ 4–7; Divided Parishes and Poor Law Amendment Act, 1882, §§ 2–7, which permitted detached parts of parishes to be amalgamated with the adjoining parish or to be constituted separate parishes.

(*v*) Local Government Act, 1933, 11th Schd.

(*w*) Local Government Act, 1888, § 60.

and the publication of a White Paper entitled "Local Government in England and Wales during the period of Reconstruction" (Cmd. 6579 of 1945) was followed by the passing of the Local Government (Boundary Commission) Act, 1945. This Act varies the procedure contained in the Local Government Act, 1933, for the adjustment of local government areas.

The events leading up to these changes are worthy of review. By the Local Government Act, 1888, which established sixty-two administrative counties and sixty-one county boroughs in England and Wales, the Local Government Board (now the Ministry of Health) was empowered on the application of a county council to alter the boundaries of the county, to unite it with any other county or county borough, to divide the county, and to alter any local government area partly situate in the county. Except in the case of the last-mentioned power, Orders made for these purposes were provisional only and required Parliamentary confirmation. Similarly, the Board could, on the application of a borough council, confer county borough status, alter the boundaries of the borough, unite it with another borough or include an urban or rural district within it, or, in the case of a county borough, unite the borough with the county. In all these cases the order required Parliamentary confirmation and the right to apply for county borough status was limited to boroughs having a population of 50,000 or upwards. Corresponding alterations could be made in the case of urban and rural districts by order made by the county council and confirmed by the Board.

After the Act was passed the extension of existing county boroughs and the creation of new ones proceeded rapidly, in fact so rapidly that the county councils found that their territories were being whittled away piecemeal. This conflict of interest led to the setting up in 1922 of a Royal Commission on Local Government under the chairmanship of Lord Onslow. The First Report of that Commission (x) made a number of unanimous recommendations, to which effect was given by the Local Government (County Boroughs and Adjustments) Act,

(x) Cmd. 2506 of 1925.

1926. This Act abolished the power of the Minister of Health to create a new county borough by provisional order and forbade applications to Parliament for that purpose if the population of the borough did not exceed 75,000. It also provided that (except where the proposals were agreed) county borough extensions could be effected only by private Act and not, as previously, by provisional order.

The Second Report of the Commission (y) resulted in the introduction, in the Local Government Act, 1929, of a new system for dealing with the adjustment of county districts and parishes. The new procedure followed the broad outline of the old, the initiative lying with the county council and the final decision with the Minister, but with the important distinction that it recognised that the process of adjustment ought to be undertaken systematically at specified intervals rather than piecemeal. Accordingly, while the old procedure was left on foot to deal with exceptional cases, every county council was required as soon as might be after the passing of the Act to initiate a review of its county and to submit to the Minister its proposals for alterations of status and boundaries of county districts and parishes. The Minister was empowered, as before, to approve by order the proposals either with or without amendment. If a borough council took objection to any proposal affecting the borough, the Minister's order was to be provisional only and to require confirmation by Parliament, but this provision did not apply to the first review.

Between any two reviews there was to be a ten-year interval, and at the end of that period the county council might institute a further review, or might be required by the Minister to do so.

The provisions referred to, in the Acts of 1888 and 1929, were consolidated by the Local Government Act, 1933, in §§ 140-146 of that Act.

The first series of reviews under the Act of 1929 took place between 1931 and 1937 but, though the number of urban and rural districts was quite considerably reduced, the success of

(y) Cmd. 3213 of 1928.

this procedure was somewhat uneven and, in some areas, met with strong opposition.

3. Local Government (Boundary Commission) Act, 1945.—During the war further adjustment of local government areas was barred by § 6 of the Local Elections and Register of Electors (Temporary Provisions) Act, 1939, and similarly there have, during that period, been no applications to Parliament for Bills dealing with county borough extensions or the creation of new county boroughs.

The Act of 1939, which was extended from year to year, expired on March 31, 1945, and it might have been expected that a number of county councils would have considered making their second county review, in addition to the promotion of Parliamentary Bills for the extension of county boroughs and for other adjustments of areas. The redevelopment of war-damaged towns also presented problems which did not exist before the war.

In these circumstances it was felt that a new procedure was justified, and this was outlined in the White Paper (z) and subsequently embodied in the Local Government (Boundary Commission) Act, 1945. Under this procedure all proposals for adjustments, whether of the boundaries of counties and county boroughs or of county districts, will in the future be examined by a single body, the decisions of this body being made subject, in appropriate cases, to Parliamentary review.

There are two exceptions to the all-embracing powers of the body set up by the Act of 1945. In the first place, the royal prerogative is not affected, (a) so that new boroughs will continue to be created by Royal Charter. Secondly, the Act contains a saving for municipal corporations (b) by which the rights, privileges and immunities of municipal corporations or the operation of a municipal charter are not to be affected, except that the power of promoting a Bill for the purpose of

(z) Cmd. 6579 of 1945.

(a) Local Government (Boundary Commission) Act, 1945, § 6.

(b) § 7.

constituting a borough a county borough (c) may in future be exercised only where the borough has a population of 100,000 or more.

The main provision of the Act of 1945 is to provide for the establishment of a Local Government Boundary Commission, with the duty of reviewing all the local government areas of England and Wales (except London) and of exercising the powers of altering those areas which the Act confers (d). The Commission consists of a chairman, deputy chairman and three other members, and is a body corporate (e).

The Commission is to be guided in its work by general principles which are to be laid down by the Minister of Health in regulations (to be approved by a resolution of both Houses of Parliament) which he is empowered to make after consulting the associations of local authorities (f).

The powers of the Commission to alter areas are stated in § 2 of the Act :—

- (a) to alter or define the boundaries of a county, county borough or county district ;
- (b) to unite a county with another county, or a county borough with another county borough, or to unite a non-county borough with another non-county borough, or an urban or rural district with another district, whether urban or rural, or to include an urban or rural district in a non-county borough or any county district in a county borough ;
- (c) to divide a county into, between or among two or more counties or an urban or rural district into two or more districts, whether urban or rural, or between or among two or more areas, whether county boroughs or county districts ;
- (d) to constitute a borough (either by itself or together with the whole or any part of another county district) a county borough ;

(c) Local Government Act, 1933, § 139.

(e) First Schedule, para. 1.

(d) § 1.

(f) § 1 (3).

- (e) to direct that a county borough shall become a non-county borough and specify the county in which it is to be included ;
- (f) to constitute a new urban or rural district, or to convert a rural district into an urban district or an urban district into a rural district ;
- (g) so far as appears to the Commission to be requisite in connection with any exercise of their powers under the previous paragraphs, to alter the boundary between a parish and another parish, to unite a parish with another parish, to divide a parish into, between or among two or more parishes, or to constitute a new parish.

There are, however, certain limitations upon the powers of the Commission :—

- (a) no part of the administrative county of Middlesex is to be constituted a county borough ;
- (b) it is made clear that the Act does not affect His Majesty's power to grant a commission of the peace and a court of quarter sessions to any borough ;
- (c) a borough cannot cease to be a borough, except by being united with another county borough or, in the case of a non-county borough, by being included in a county borough (g).

Obviously the Commission will take some time to review the whole of England and Wales and, in addition to a general power to review the circumstances of any area they think fit, the Minister may direct them to consider, or to give priority to the consideration of, the circumstances of particular areas. In addition, the Commission must take into consideration applications made by a county council or a county borough council. The council of a county district may make representations to the Commission, to the Minister or to the county council, but may not claim consideration of its proposals as of right, except in the case of a borough with a population of

(g) This is the combined effect of § 2 (1) (b) and § 7.

100,000 or more which applies to be constituted a county borough (*h*).

Any decision of the Commission, either that an alteration should or should not be made, is to be embodied in an order, which will be provisional only where it relates to a county or a county borough (including an order directing the constitution of a county borough or that a county borough shall become a non-county borough, or refusing such a direction). In such cases the Commission must send to the Minister a statement describing the proceedings leading to the making of the order, summarising any representations made for or against the order, and setting out the considerations leading them to make the order. This statement is then to be laid before Parliament (*i*).

When an order of the Commission has come into operation, no further order altering the area concerned shall be made within ten years unless the Commission are satisfied that by reason of a substantial change in the distribution of population or other exceptional circumstances it is desirable to do so (*j*).

The exercise by the Commission of their functions is to be regulated by regulations made by the Minister and confirmed by resolution of both Houses of Parliament, and these regulations :—

- (a) must allow opportunity for objections to be made by persons likely to be affected, and must secure that a local inquiry is held where objections are made by a county, county borough or county district council likely to be affected and are not withdrawn ;
- (b) may empower the holding of local inquiries generally, and may make provision for the conduct of local inquiries.

Annual reports of the Commission's proceedings are to be sent to the Minister and laid before Parliament (*k*).

Those provisions of the Local Government Act, 1933, which are superseded by the Act of 1945, *i.e.* §§ 140, 143 and 146,

(*h*) § 3 (1), (2), (3), (4) and (5).
(*j*) § 3 (8).

(*i*) § 3 (6), (7), (9) and (11).
(*k*) § 5.

and part of § 141, are repealed by the Second Schedule, but the supplementary provisions contained in §§ 148 to 154 and 275 of that Act with regard to the making of orders by the Minister are to apply to orders made by the Commission (*l*).

County Electoral Areas.—The internal divisions of these first-rank authorities, that is, counties and county boroughs, are altered in a slightly different manner. In this respect county boroughs differ not at all from non-county boroughs, and the consideration of their division into wards may be postponed for the present. Counties, however, are in a different position. Their internal divisions are arranged on two separate plans and for two separate purposes. Most obviously they are divided into county districts, the latter being re-divided into parishes ; but this type of division is not directly effected for county purposes, but rather that smaller authorities may be brought into existence within the overriding area of the administrative county, and, as we have seen, the alteration of these areas is now a matter for the Local Government Boundary Commission. For strictly county purposes the area of the administrative county is divided into “electoral divisions,” each returning one county councillor (*m*). In the arrangement of these electoral divisions two considerations are of governing importance. First, every division should be approximately equal in population, subject however to variations designed to prevent great disparity in area, to obtain a proper representation of both rural and urban population and to take account of the distribution and pursuits of the population. Secondly, a symmetrical arrangement of the boundaries of electoral divisions must be secured so that they coincide with the boundaries of county districts, parishes or wards and do not create divisions bearing no relation to the existing local government areas within the county (*n*).

The alteration of these electoral divisions is a matter for the consideration of the Home Secretary, as the Minister concerned

(*l*) § 4.

(*n*) *Ibid.*, § 11.

(*m*) Local Government Act, 1933, § 10.

in general with the question of elections throughout the country. But like the Minister of Health the Home Secretary has no power to act until he is set in motion by the activities of a local authority interested. This is effected either by the county council making a representation, or by a district council making one where the county council has refused or neglected to act at the request of the district council. The representation may relate to the alteration of the boundaries of an electoral division, or to the alteration of the number of county councillors and consequently of the electoral divisions in the county. The authority applying to the Home Secretary for either of these purposes is required to send copies of the proposed alterations to the local authorities in the area likely to be affected, and must advertise its intention in the local press. A period of six weeks is then allowed to elapse during which petitions against the proposed changes may be sent to the Home Secretary. At the end of this period the Home Secretary may simply decide not to entertain the proposals, or he may consider that the question merits further consideration. In the latter case the procedure varies according as petitions against the proposed alterations have or have not been received. If petitions from any local authority in the county or from at least one-hundred or one-sixth of the local government electors of any electoral division (whichever number is the less) have been received, the Home Secretary must hold a local inquiry. In other cases he may dispense with this examination of local opinion and may proceed directly either to make the order or to refuse to do so (o).

From August 1, 1939, until March 31, 1945, the Local Elections and Register of Electors (Temporary Provisions) Act, 1939, as extended, prohibited any alterations of wards or electoral divisions.

Borough Wards.—A similar direct relation between even non-county boroughs and the Central Government governs

(o) The order is not provisional, but takes effect of its own force : Local Government Act, 1933, § 11.

the alteration of those internal divisions of a borough which relate to the holding of elections (*p*). Some boroughs are divided into wards for the election of councillors, while others are not so divided, the whole borough forming but one electoral area (*q*). The division into wards of a newly created borough is one of the matters which may be provided for by the charter of incorporation (*r*). Subsequent changes, whether by dividing the borough into wards, altering the boundaries of existing wards or their number or by altering the number of councillors, may only be made by Order in Council. If the council of a borough desires any of these changes to be made it may present a petition to His Majesty praying that its wishes may be given effect to. The petition must be accompanied by a statement of proposals intended to bring about the desired alterations, and notices of these matters must be advertised locally in the press. The King in Council may simply refuse to entertain the suggested proposals and dismiss the matter, or may decide that the application is worthy of consideration. In the latter case the further proceedings are simple if the petition prays solely for an alteration in the number of councillors and comes from a borough not divided into wards, for in this case an Order in Council may be made at once effecting the desired alteration. In all other cases however, if the prayer in the petition is to be granted, it will obviously involve some arrangement or re-arrangement of the actual territorial wards of the borough, and this can hardly be properly performed by the Privy Council itself. In such cases, therefore, the petition is referred to the Home Secretary to appoint a commissioner, who, after holding such local inquiries as he thinks necessary, prepares a scheme for carrying into effect the prayer in the petition. This scheme is then submitted to the King in Council in order that it may be approved by Order in Council. If the scheme is approved the borough council must publish notices of its making in the *London Gazette* and the local press,

(*p*) These provisions apply without distinction in the case both of county boroughs and non-county boroughs.

(*q*) See Local Government Act, 1933, § 24.

(*r*) *Ibid.*, § 131.

and the scheme comes into operation on the day fixed by the Order in Council which approves it (s). During the war alterations of wards have been prohibited (t).

Wards in Urban Districts.—A very similar set of provisions governs the division of an urban district into wards for the election of urban district councillors, the alteration of the number or boundaries of wards, the alteration of the number of councillors or a change in the apportionment of the councillors among the wards. The county council may hold a local inquiry either on its own motion or on receiving proposals from the urban district council, which is also given a right to appeal to the Home Secretary from the county council's refusal to act or to make an order. Similar provisions govern the advertisements and notices necessary, but there is no necessity for confirmation by any central authority. After making a draft order the county council must give notice of it by advertisement in local newspapers and must wait six weeks during which representations may be made. After considering any representations which it has received, the county council may make a substantive order giving effect to the required changes (u), and copies of the order must be sent to the Home Secretary and the Minister of Health (v). War-time alterations of wards have been prohibited (w).

Wards, etc. in Rural Districts.—Over the internal electoral arrangements of rural districts the county council's control is even greater. Normally the election of rural district councillors is by parishes, but the county council may by order divide a parish into wards, alter their boundaries and fix the number of councillors to be elected for each ward, and it may combine adjoining parishes for the election of rural district councillors (x), the only vestige of central supervision lying in the requirement that copies of the order must be sent to the

(s) See Local Government Act, 1933, § 25.

(u) Local Government Act, 1933, § 37.

(v) See above.

(x) Local Government Act, 1933, § 38.

(t) See above, p. 75.

(w) *Ibid.*, § 56.

Home Secretary and the Minister of Health (y). War-time alterations of wards and parishes have been prohibited (z).

7. Parishes.—Parishes, whether they are rural or urban, still fall, as far as their creation and alteration is concerned, under the same provisions, contained in § 141 of the Local Government Act, 1933, which, until the passing of the Local Government (Boundary Commission) Act, 1945, governed the creation and alteration of urban and rural districts, and the same procedure governs the making of the necessary orders and their confirmation by the Minister of Health (a). Only one thing served to distinguish the case of the parish from that of the urban or rural district. If a parish is situated in an administrative county, then whether it is a rural parish or an urban one (and in the latter case whether it lies within an urban district or a non-county borough), the county council may make an order for submission to the Minister providing for the alteration or definition of its boundaries, its division, the transfer of part of it to another parish, its union with another parish, or for the formation of a new parish. On the other hand, the county council has no control over the area of a county borough, while conversely a county borough can have no control over any district councils, being itself composed only of one or more urban parishes. Consequently, the powers, so far as they relate to the alteration, division, transfer, or union of parishes situated in a county borough, are conferred upon the county borough council (b).

Urban parishes have now no organisation for local government and do not themselves form even electoral divisions of larger authorities. Rural parishes are, however, important in both respects, and we have already seen the powers of county councils to constitute and dissolve parish councils (c), as well as to make and revoke grouping orders and to divide large parishes for electoral purposes into wards (d).

(y) Local Government Act, 1933, § 56.

(z) See above, p. 75.

(a) See above, p. 82.

(b) Local Government Act, 1933, § 141.

(c) *Ibid.*, §§ 43 and 44.

(d) *Ibid.*, §§ 45 and 52. See above, p. 81.

Whilst these powers of alteration of parishes are not affected by the Local Government (Boundary Commission) Act, 1945, an additional power is given to the Local Government Boundary Commission created by that Act, to alter the boundary between two parishes, to unite two parishes, to divide a parish into, between or among two or more parishes, or to constitute a new parish, if it appears to the Commission to be requisite in connection with any exercise of their powers of altering other local government areas under that Act (*e*).

Financial Adjustments, etc.—However alterations in areas or the creation of new authorities are effected, it is obvious that many incidental matters will have to be provided for in the order which produces the change. Power to deal with these matters, and in particular with the transfer and compensation of officers affected by the alterations, is contained in §§ 46, 148 and 150 of the Local Government Act, 1933, which still apply to alterations of areas, etc., by order of the Local Government Boundary Commission under the Local Government (Boundary Commission) Act, 1945. Two important considerations in this connection must, however, be noticed. First, an order altering areas or creating new authorities may even contain provisions amending any local Act (*f*). Secondly, alterations in local government areas involve the necessity of making some adjustment of the property, income, debts, liabilities, expenses and financial arrangements between the affected authorities. The order may itself contain provisions for the adjustment of property, debts and liabilities (*g*). In so far as the order effecting the alteration does not itself make the necessary adjustment, the local authorities concerned are empowered to make financial adjustments by agreement (*h*). In default of agreement, arbitration by an arbitrator appointed by the parties or, if they are unable to agree, by the Minister of Health is prescribed. Earlier legislation laid down no very certain principles to be observed in arriving at these “adjustments”

(*e*) See above, p. 75.

(*g*) *Ibid.*, §§ 46, 132 and 148.

(*f*) Local Government Act, 1933, § 149.

(*h*) *Ibid.*, § 151.

beyond the general statement that they were to deal with "any property, income, debts, liabilities and expenses." In 1907 the House of Lords upset what had become a common head of claim in arbitrations, by holding that, in arriving at an adjustment, no account could be taken of the injury to either party arising out of the loss of rateable value, or the increased burden of administration, in so far as the rates of the area affected by an alteration were in excess of or less than the cost of administering services therein (*i*). To get rid of this decision the Local Government (Adjustments) Act, 1913 (amended by the Local Government (County Boroughs and Adjustments) Act, 1926), was passed, and the law thus enacted is now contained in § 152 of the Local Government Act, 1933 (*j*).

The sums which are payable from one authority to another under an adjustment may be discharged either by a capital payment or by terminable annuities, and in the former case the authority liable to pay may borrow for this purpose (*k*).

Alteration by Private Bill.—Finally, it should be noticed that though the statutes dealing with local government provide the many powers of altering areas mentioned above, there is in addition a sovereign way of effecting almost any change (*l*). Parliament may by its enactments do anything that is physically possible. Thus by appeal to Parliament in the form of the promotion of a private Bill a local authority may attempt to procure any alteration in its boundaries which it thinks Parliament is likely to sanction. This short-cut, as it were, was widely used in the past; sometimes because it was desired to overcome the reluctance of the Ministry of Health to exercise

(*i*) *West Hartlepool Corporation v. Durham County Council* [1907] A.C. 246; 33 Digest 25, 115.

(*j*) The adjustment of Exchequer grants is governed by regulations of the Minister of Health made under § 108 of the Local Government Act, 1929.

(*k*) Local Government Act, 1933, § 151.

(*l*) But the council of a borough may not promote a Bill for the purpose of constituting the borough a county borough, unless the population of the borough is at least one hundred thousand: Local Government Act, 1933, § 139, and Local Government (Boundary Commission) Act, 1945, § 3 (*12*). See above, p. 75.

its powers of ordering or confirming an alteration, and at other times because the ordinary methods of alteration did not provide a means of dealing with some difficulty which the circumstances of the case presented. In any event the promoters of a private Bill often felt more their own masters than an authority which was content to apply, for instance, for the making of a provisional order. The legislation was of their own drafting and they were in control of its course through Parliament, able to accept compromises or to withstand opposition.

As a result of the passing of the Local Government (Boundary Commission) Act, 1945, however, it may well be that Parliament, having provided what is intended to be a fairly simple method of obtaining changes desired, will look less favourably upon attempts to avoid following the procedure which it has created. If not, it is likely that the main objects of that Act will be defeated.

CHAPTER IV

REPRESENTATION

Democratic Principle in Local Government.—It will have become obvious from the review of local authorities undertaken in Chapter II that local government is now carried on in England by bodies depending closely upon the support of the inhabitants of the areas administered by them, and a consideration both of the principles upon which the wishes of the governed are reflected in local administration and of the rules of law determining the way in which these principles are brought into operation must now be embarked upon.

Direct and Representative Government.—The parish meeting gives us an interesting illustration of the principle of direct government. In the thinly inhabited and small rural parish it is possible to call upon the governed themselves directly to undertake their own government, and the parish meeting is composed of all the local government electors for the parish (*a*). In larger areas, however, where the population is too great to be called together into one body and where the business is too complex to be adequately undertaken in the clamorous atmosphere of a public meeting, a system of representation has to be adopted. At the present day all local authorities, other than the parish meeting, are composed of representatives of the local government electors of the area (*b*). The governed cannot themselves directly do the work of local government, and the nearest approach to this ideal is to enable

(*a*) Local Government Act, 1933, § 47.

(*b*) An exception exists in the case of small rural districts where the number of councillors is less than five, for in such cases the Minister of Health is empowered to nominate sufficient members to make the number of councillors up to five : Local Government Act, 1933, § 42.

them to govern themselves indirectly through a small number of elected representatives. Thus at the present day local authorities depend for their composition upon the representative principle ; but its application is by no means uniform and some of the many ways in which that principle is capable of operating are well illustrated by the rules laid down for the composition of the different local authorities at present existing.

Direct and Indirect Election.—Direct election of councillors forms a uniform element in the composition of all local authorities in which the principle of representation operates, and the tenure of office of councillors in all these bodies is likewise uniform, being for the period of three years (*c*). But it must be remembered that in the composition of all local authorities to a very small extent at least, and in some of them to a quite considerable extent, a system of indirect election obtains, the choice being made not by the general mass of electors, but by the persons they have elected. Thus all councils from the parish to the county have the right to choose their president, whether called chairman or mayor, and are empowered to elect to that position a person who is only qualified for election as a councillor and has not actually been returned to the council by the local government electors of the area (*d*).

The Aldermanic Principle.—The election of president is a small matter, but indirect election assumes greater proportions in the case of those local authorities where the aldermanic principle is in operation. This principle applies both in borough and county councils. It ensures that one-quarter of the members of the council shall not be directly elected by the burgesses or county electors, but shall be chosen by the councillors from among themselves or from persons qualified for election as councillors. Moreover the tenure of office of aldermen is six years, and half

(*c*) Local Government Act, 1933, §§ 8, 23, 35, and 50.

(*d*) *Ibid.*, §§ 3, 18, 33, and 49. The chairman or mayor is elected annually, but he remains in office until his successor is elected and has accepted office.

their number retire every three years (*e*). Aldermen do not, as it were, form a second chamber: for the period of their office they are members of the council with no different position from that of councillors. The justification for the method of their election must be found in the principle that the councillors, being elected by the electorate as their representatives, are presumably persons in whom the electors repose implicit trust, and who are therefore aptly qualified to reflect, in their choice of aldermen, the true wishes of the electors. This aldermanic principle was first introduced by the Municipal Corporations Act, 1835, as a concession to Conservative fears that a council, wholly composed of persons directly elected for such a short time as three years, would prove too unstable a body for the proper conduct of important work often demanding the prosecution through considerable periods of a consistent policy. The aldermanic principle, through the longer tenure of office it ensures to a quarter of the council, does give an element of stability and continuity, and, by enabling membership to be secured without, what is to some persons, the unpleasantness of a public election, it does in theory open the door of the council to men and women of ability whose services could not otherwise be obtained. In fact, however, the latter justification is of little weight, as in most borough and county councils an agreement between the political parties represented on the council usually covers the election of aldermen, and a seat on the aldermanic bench is regarded as a reward for past services in the lesser security of the office of councillor. Against the advantages of continuity secured by the aldermanic principle must be set the disadvantages flowing from the fact that so large a portion of the council, holding office for so long and not directly elected, tends to make the whole body out of touch with the opinions of the electorate, and further that a political party temporarily gaining an ascendancy may, by filling one-half of the aldermanic bench with its own nominees, be able to entrench itself in power for a definite period of years. To a greater degree than in the case of local authorities which

(*e*) Local Government Act, 1933, §§ 6 and 21.

are wholly directly elected, borough and county councils are unresponsive to changes in popular feeling.

Partial Renewal and Simultaneous Retirement.—If we turn from the aldermanic principle to a consideration of the principles underlying the election of councillors, whether to authorities of which they compose the whole or only part of the membership, we shall find some variety in the applications of the principle of representation. In all local authorities the councillors are directly elected for periods of three years. In some, however, a system of partial annual renewal applies and the elections are so arranged that one-third of the number of councillors retires each year, so that each year an election has to be held to fill the vacancies created. This principle applies to borough councils (*f*) and to district councils, unless in the latter case an order has been obtained from the county council for the simultaneous retirement and election of the whole council (*g*). On the other hand, in parish and county councils and in those district councils for which a county council order has been obtained, there is a system of simultaneous retirement of all the councillors : in other words, the whole body of councillors retires *en bloc* in every third year, when all the councillors have to submit themselves to the judgment of the electorate (*h*).

In borough and those district councils where the system of partial renewal of one-third each year applies, a degree of continuity is obtained which is impossible otherwise. Moreover the borough or district is never faced with the risk of being governed by an entirely new council wholly inexperienced, which may conceivably occur in the other cases. Again, annual elections mean that the opinion of the electorate can be tested at such short intervals as one year, while where simultaneous retirement is the rule the *vox populi* is silent for longer periods. Against the principle of partial renewal it might, however, be urged that a change in the opinions of the electorate, though

(*f*) Local Government Act, 1933, § 23.

(*g*) *Ibid.*, § 35.

(*h*) *Ibid.*, §§ 8, 35, and 50.

it may be noticed sooner, conceivably may not obtain response from the council much more quickly than in the case of a body subject to the rule of triennial renewal, since in the former case at each election only one-third of the councillors' seats can be affected.

Responsiveness of Local Authorities to the Electorate.

To obtain a complete view of the ways in which the representative principle is applied in local government it is necessary to combine the two matters just dealt with and to consider the manner in which the aldermanic principle is associated with the methods of renewal of councillors. Looked at in this way, a list of authorities may be drawn up in the order of responsiveness to the wishes of the electorate.

First come parish and district councils in respect of which county council orders for triennial elections have been obtained. Here the whole council changes every third year, the whole of its members retiring simultaneously. Secondly, district councils, which have not availed themselves of the right to ask for an order to be made by the county councils, change one-third of their whole number every year, since they have no aldermen and their councillors are subject to the principle of partial renewal annually. The other two authorities, the borough and county councils, both have applied to them the aldermanic principle ; so that, thirdly, come county councils, the whole of whose councillors retire *en bloc* every third year and where the newly elected councillors elect the one-half of the aldermanic bench which falls to be filled simultaneously with their own election. The result is that at the end of every three years the county council as to seven-eighths of its numbers is new, and the remaining eighth is indirectly the reflection of the opinion of the electorate of only three years before. Fourthly, the borough councils, while also partly composed of aldermen, differ from county councils in that the election of councillors is governed by the principle of partial renewal, so that one-third of their number retires annually. Thus the one-half of the aldermanic bench which is filled every third year is chosen by

councillors some of whom are the choice of the electorate of two years earlier, while others have held office for one year already, and the remaining third are newly elected. What may be the age of the political opinion of the electorate which, say, a retiring borough alderman may reflect is, thus, a pretty mathematical problem !

War-time Suspension of Elections.—It was decided in the early days of the war that it would be inappropriate to hold the ordinary local government elections, and the Local Elections and Register of Electors (Temporary Provisions) Act, 1939, accordingly provided for the discontinuance of elections and the extensions of the terms of office of existing councillors and others. The Act was continued in force by Annual Acts with the same title until March 31, 1945 (*i*). Under the Acts the term of office of any alderman or councillor in office when the Act of 1939 expired is continued for six months after that date (*j*).

Casual vacancies were filled, in the case of aldermen, as if the Act had not been passed ; in the case of councillors, vacancies were filled by the Council itself from persons possessing the qualifications for holding the office (*k*).

Part II of the Representation of the People Act, 1945, provides for the resumption of local elections. In the first place the period beginning on the day on which councillors elected at the last ordinary election and (a) March 8, 1946, in the case of county councillors ; (b) April 15, 1946, in the case of district and parish councillors, is to be treated as three years for the purposes of the Local Government Act, 1933, which limits their term of office (*l*). In the case of boroughs and district councils one-third of whose members retire annually the provisions are more complicated. Borough councillors elected at the ordinary election in 1936 and councillors subsequently

(*i*) Local Elections and Register of Electors (Temporary Provisions) Acts, 1940, 1941, 1942, 1943 and 1944.

(*j*) 1939 Act, proviso to § 10 (2), as amended by the 1940 Act.

(*k*) *Ibid.* § 1.

(*l*) Representation of the People Act, 1945, § 4.

elected under the Local Government Act, 1933, to fill casual vacancies in the office of councillors elected at that election, together with councillors elected to fill casual vacancies under the Act of 1939, retired) on November 1, 1945. The same procedure applies to district councillors except that the election is the ordinary election of 1937 and the date of retirement was April 15, 1946. The vacancies were then to be filled in the same manner as under an ordinary election (*m*). Elaborate provisions are also included to determine which of the remaining councillors and those elected at the first election shall retire on the first and second anniversaries of the above-mentioned dates (*n*). In consequence in three years' time from the resumption of elections the position will revert to normal.

As regards aldermen, the period between the last ordinary election of aldermen and (a) the annual meeting of the county council in 1946, in the case of county aldermen, and (b) the annual meeting of the borough council in 1945, in the case of borough aldermen, is to be regarded as six years, and ordinary elections of aldermen will be held accordingly under the Local Government Act, 1933 (*o*).

It remains to consider the law by which the normally operative principles outlined above are put into actual practice. For the representative principle to work it is necessary to have rules determining who are entitled to be represented, in other words, what is the franchise; who are qualified to act as representatives; the machinery of choice, or election; and the methods by which disputed elections may be questioned. These problems will be dealt with in the order named.

1. The Local Government Franchise.—Since 1918 there has been only one franchise for all elections to all local authorities, the chaos of the nineteenth century having been replaced by uniformity. The right to vote at an election for a local authority was then conferred only upon persons whose names appear upon the register of electors for the area in question as

(*m*) *Répresentation of the People Act*, 1945, § 5 (1), (2) and (8).

(*n*) *Ibid.*, § 5 (3), (4) and (5).

(*o*) *Ibid.*, § 4 (2).

“local government electors” (*p*). A new register is normally prepared annually and comes into force on the fifteenth of October in each year (*q*). The making of this register is the duty of the “registration officer,” the clerk to the county council, or the town clerk in boroughs (*r*). Lists of persons entitled to vote are prepared by the officers of the rating authorities and sent to the registration officer, who causes them to be published. Then objections to the inclusion of the names of persons alleged to be unqualified and claims for inclusion by persons who allege that they have been wrongly omitted may be made during a prescribed period to the registration officer, who hears the parties and gives a decision upon the questions arising. An appeal lies from the registration officer’s ruling to the local County Court, with a further appeal upon any point of law to the Court of Appeal. But the decision of the Court of Appeal is final (*s*).

However, during the war, special arrangements have been necessary. Under the Local Elections and Register of Electors (Temporary Provisions) Act, 1939, as extended from year to year until March 31, 1945, no register of electors was prepared under the normal system after that published in 1939. Part I of the Parliament (Elections and Meeting) Act, 1943 (cited separately as the Parliamentary Electors (War-Time Registration) Act, 1943), introduced temporarily a new system for the registration of electors, based on the National Register, and to continue in force until shortly after the expiry of the National Registration Act, 1939. Amendments were made to this system by the Parliamentary Electors (War-Time Registration) Act, 1944, and the first register prepared under the Acts came into force in May, 1945, and was followed by a second register in October, 1945. The above-mentioned registers were only to apply to Parliamentary elections, but § 13 (1) of the Representation of the People Act, 1945, now provides that the register

(*p*) Representation of the People Act, 1918, §§ 8, 42, and 6th Schd.

(*q*) *Ibid.*, § 11, as amended by Economy (Miscellaneous Provisions) Act, 1926, § 9.

(*r*) *Ibid.*, § 12.

(*s*) *Ibid.*, §§ 13, 14, and 1st Schd.

of electors to be in force for local government elections held before the coming into force of a new register prepared under § 11 of the Act of 1918 is to be an annual register to be prepared under Part III of the Act of 1945 and coming into force on October 15 in each year.

It is to consist of two parts : (a) a part (to be called the "general register") containing the names of parliamentary and local government electors qualified under § 1 of the Act of 1945 and consisting of a civilian residence register, a business premises register and a service register ; and (b) a part (to be called the "rate-payers register") containing the names of local government electors registered in respect of any other qualification. So far as it is a register of local government electors it is to be prepared in accordance with the Second Schedule to the Act of 1945 and so far as it is a register of parliamentary electors it is to be prepared as if it were a register prepared under the Act of 1943 for a parliamentary election initiated on August 1 (*t*).

The preparation of the register on the new system is a complicated matter and in view of its temporary nature it is not proposed to explain the system in detail.

The local government franchise, that is, the right to have one's name appear upon the register, has, until now, depended, broadly speaking, upon occupation of land or premises within the area during the "qualifying period" of three months ending on the first of June in the year in which the register came into force. More accurately, the franchise, as defined by § 2 of the Representation of the People (Equal Franchise) Act, 1928, was as follows :

A person was entitled to be registered as a local government elector for a local government electoral area if—

- (i) he or she was of full age, and
- (ii) not subject to any legal incapacity (*u*), and

(*t*) Representation of the People Act, 1945, § 15 (2).

(*u*) Such as being an alien, a convicted felon, etc. ; but peers are entitled to be registered as local government electors, though not as parliamentary electors.

(iii) either,

- (1) (a) was on the first of June occupying as owner or tenant (*v*) any land or premises in that area, and
- (b) had during the whole of the qualifying period so occupied any land or premises (*w*) in that area, or (except where that area was itself an administrative county or county borough) in any administrative county or county borough in which the area is wholly or partly situate,

or

- (2) was the husband or wife of a person entitled to be so registered in respect of premises in which both the person so entitled and the husband or wife, as the case may be, resided.

In other words, subject to the general disabilities of minority, alienage, etc., which are of universal application, the right to be registered as a local government elector depended upon being within either of the two following categories : (1) In the occupation on the first of June of premises within the electoral area ; but, though this determined which area the person was entitled to be registered in respect of, he or she must in addition during the preceding three months have occupied the same or other premises either within the same area or within a larger local government area within which the electoral area is itself situated. Thus if a man was on the first of June occupying a house within the area of an urban district council, and had during the preceding three months been occupying other premises within the same district, or even the same county, he was entitled to be registered for that urban district. (2) Secondly, the husband or wife of an occupier so qualified, provided he or she was residing with the occupier on the first of June in the premises which entitled the occupier to be registered, was also entitled to be registered in respect of the same electoral area (*x*).

(*v*) Which includes a lodger hiring an unfurnished room.

(*w*) Not necessarily, that is, the same land or premises, which he or she was occupying on the first of June.

(*x*) The extent of this franchise has now been varied. See below, p. 98.

Electoral Areas.—To complete the description of the old local government franchise it is necessary to explain what are the electoral areas in respect of which persons occupying premises on the first of June, and their husbands or wives residing therein with them, are entitled to be registered.

In respect of membership of parish meetings or the right to vote at polls demanded at such meetings and the right to vote for parish councillors, the whole of the rural parish comprises one electoral area, though, if the county council exercises its powers in that behalf, the parish may be divided into wards each becoming a separate electoral area (*y*). In the election of members of rural district councils the constituent rural parishes, into which the district is divided, in general form separate electoral areas, but the county council may either divide large parishes into wards or may combine small parishes for the election of rural district councillors (*z*). Urban districts form single electoral areas unless the county council has divided them into separate wards (*a*). For the election of county councillors the administrative county is divided into single member electoral divisions each in general comprising one or more districts or non-county boroughs (*b*). For the election of borough councillors, in some cases the whole borough forms one electoral area, but other boroughs are divided into wards by the charter which incorporates them (*c*), and even where this is not the case a borough may be divided into wards by an Order in Council made on the application of the borough council (*d*).

Thus it will be seen that there is some overlapping of electoral areas. A small area may form a separate electoral area for the purpose of election to one authority, or may sink to the position of part only of a larger electoral area for electing the members of another and larger authority.

The result is, of course, that a local government elector may be entitled to vote at the elections for more than one council : to take the extreme case, an elector registered in a rural parish

(*y*) Local Government Act, 1933, §§ 51 and 52.

(*z*) *Ibid.*, § 38.

(*a*) *Ibid.*, §§ 36 and 37.

(*b*) *Ibid.*, §§ 10 and 11.

(*c*) *Ibid.*, § 131.

(*d*) *Ibid.*, §§ 24 and 25. See above, Ch. III.

may vote for the election of parish, rural district and county councillors. Yet it must be borne in mind that such an elector by exercising his right of voting at these three elections does not obtain greater electoral power than belongs to an elector who can vote only at a county borough election, since the latter authority combines in itself all the powers which in a county area are divided between the three local authorities having jurisdiction over it.

Parliamentary and Local Government Franchises.—

Hitherto the local government franchise has been more restricted than that entitling a person to a vote at a parliamentary election. In the latter case the law has practically reached the position of universal adult suffrage, while for local government elections the franchise was based upon the occupation of land within the area concerned. Now, however, by § 1 of the Representation of the People Act, 1945, subject to the provisions of Part III of that Act, the class of persons qualified as local government electors for any local government area has been extended to include any person who has, or but from an incapacity arising from his status as a peer would have, a qualification as a parliamentary elector qualifying him to be registered in that area. § 2 of the Act of 1945 abolishes the spouse's qualification (e).

Local Government Franchise and the Law of Rating.

The former restriction of the local government franchise to the occupiers of land or premises within the area was intimately bound up with the principles upon which the law of rating is based. Rates are the principal means of financing local government ; and their burden falls only upon the occupiers of real property, who are therefore vitally interested in controlling the policy and consequently the expenditure of local authorities. The nineteenth century perhaps carried too far the application of this doctrine that the ratepayers were alone concerned with local government authorities, and by various

(e) See above, p. 96.

systems of cumulative voting which it introduced sought to give influence closely proportioned to the amount of rates paid by each voter. All these schemes have disappeared with the passage of time ; but the recognition that local government is primarily the concern only of the ratepayer and his or her wife or husband continued to obtain as the principle upon which the local government franchise was based until the virtual assimilation of the two franchises by the Representation of the People Act, 1945.

2. Qualifications for Election.—Having explained who are entitled to choose the members of local authorities it is necessary to consider the persons whom the voters may elect to be their representatives. Here a considerable difference still exists between the law relating to parliamentary and that governing local government elections. There are certain general disqualifications which apply to prevent a man or woman from being elected to Parliament at all, but there is no rule requiring a Member of Parliament to have any particular connection with his or her constituency. In the election of members of local authorities, on the other hand, in addition to imposing general rules of disqualification, the law requires that candidates should have certain positive qualifications. The reason for this difference from parliamentary practice is to be found in the fact that, whereas Parliament is, as it were, the Central Authority for the whole nation, local authorities are only designed to govern particular areas of the country. A Member of Parliament is qualified because he is a British subject of full age, but a member of a local authority needs some additional qualification showing his fitness, by reason of his personal interest in the area, for undertaking to assist in its administration.

To deal first with qualifications for election to local authorities : these qualifications are somewhat wider than the local government franchise. They have for some time now been uniform for all local authorities, but their details, as were those of the disqualifications soon to be considered, were widely

scattered throughout the provisions of many statutes until the Local Government Act of 1933 arranged them in convenient and systematic form.

Membership of a local authority is limited to persons of full age who are British subjects, but in addition there must be a positive qualification serving to identify the candidate with the area in question. There are three alternative methods of acquiring a qualification for election to any local authority, and these may be tabulated as follows :

- (1) the ownership of freehold or leasehold property within the area of the authority, or
- (2) being registered as a local government elector for the area of the local authority in question (*f*)—*i.e.* being entitled to vote for the election of councillors for that authority, or
- (3) residence within the area of the authority during the whole of the twelve months preceding the election.

This last qualification is, however, slightly varied in the case of parish councils, where residence within the parish or within three miles of the parish boundaries since the twenty-fifth of March in the preceding year is a sufficient qualification (*g*). The extension of area in this case is designed to overcome the possibility that in such small, thinly populated areas suitable candidates may not be found. The provision, that residence since the preceding twenty-fifth of March suffices, does not amount to a great alteration in the more general principle, since elections to parish councils have to be held so that the newly elected councillors may come into office on the fifteenth of April (*h*).

In addition to the above-mentioned qualifications, § 7 of the Representation of the People Act, 1945, provides for the temporary continuance of the qualification of certain persons mentioned in the section.

(*f*) This qualification has been widened as a result of the extension of the local government franchise by § 1 of the Representation of the People Act, 1945.

(*g*) Local Government Act, 1933, § 57.

(*h*) *Ibid.*, § 50.

3. Disqualifications for Election.—The qualifications for election to local authorities are all, it will be seen, designed to require some personal connection with the area, either by the ownership or occupation of land or by residence within its boundaries. The disqualifications which must now be considered are more general, in that their purpose is to prevent persons unfitted either constitutionally or by reason of their own acts from becoming at all concerned in local government. These disqualifications were formerly many and were created either by the constitutional codes governing the composition of the various local authorities or by special legislation dealing with particular topics. The result was, not only that the law was difficult to ascertain, but also that there were many divergences between its application to different types of authorities. Broadly speaking, borough and county councillors were governed by one code of law (*i*), while district and parish councillors came under the provisions of another code (*j*) differing in important particulars. A further difference existed in respect of the disqualification produced under both sets of provisions in the case of a person concerned in any contract with the council, for while the disqualification was uniform in both cases, the Municipal Corporations Act, 1882 (*k*), contained a further restriction debarring a member of borough and county councils from voting or taking part in the discussion of “any matter before the council, or a committee, in which he has, directly or indirectly, by himself or by his partner, any pecuniary interest.” This showed that the danger of permitting a conflict of public duty with private interest could be met in ways other than by the imposition of a disqualification from membership of local authorities, and the unsatisfactory working of the disqualification clauses, as shown by the decision of the House of Lords in *Lapish v. Braithwaite* (*l*), led the framers of the Act of 1933,

(*i*) Municipal Corporations Act, 1882, §§ 12 and 39; Local Government Act, 1888, § 75.

(*j*) Local Government Act, 1894, § 46.

(*k*) § 22.

(*l*) [1926] A.C. 275; 33 Digest 67, 405; where it was held that a shareholder and managing director of a limited company, who was paid by salary

in producing one uniform code of disqualifications, to make considerable changes in the law which previously existed. As a consequence the disqualification, formerly produced by interest in a contract with the local authority, has disappeared and has been replaced by provisions debarring a member so interested from taking part in deliberations of the council or its committees which relate to any matter in which he is concerned (*m*).

The disqualifications which prevent a person from being elected as a member of a local authority are contained in § 59 of the Local Government Act, 1933, and may be tabulated as follows :

(i) Holding any paid office or other place of profit in the gift or disposal of the local authority in question or of any of its committees.—This disqualification covers not only the officers and servants of the local authority itself, but extends to disqualify a paid officer of one local authority, who is employed under the direction of a committee or sub-committee of that authority any member of which is nominated by another authority, from becoming a member of the latter authority (*n*). Similarly teachers in non-provided schools maintained by a local education authority are treated as in the same position as regards disqualification as if they were employed in a school actually provided by that authority. In express terms the disqualification prevents a recorder or elective auditor of a borough from being a member of the council of that borough, and a coroner from being a member of the council of the borough or county which appoints him. Again, in the case of county or county borough councils, which since the Local Government Act, 1929, have been poor law authorities, any paid poor law officer, or any person who has been and not by a commission on the company's profits, was not disqualified from membership of a local authority with which his company had entered into a contract.

(*m*) Local Government Act, 1933, §§ 76 and 95. See below, p. 122.

(*n*) *E.g.* public assistance officers who, though appointed by the county council, act under the directions of guardians committees, which are technically sub-committees of the county council but which are partly composed of members nominated by district councils; see below, p. 676. Under this provision such officers are debarred from membership not only of the county council but also of any of the constituent district councils. This is, however, to be varied in the case of teachers by the Education Bill now before Parliament.

such an officer and has been dismissed from his post within the preceding five years, is disqualified.

Certain exceptions, however, exist. A person merely because he holds the office of returning officer in a county (*o*) is not disqualified from membership of the county council which appointed him to that office, unless he or his partner receives any profit or remuneration from holding the office. In a few exceptional cases a person is not disqualified by the holding of an office from which he derives a remuneration. The mayor of a borough (*p*) and the chairman of a county council (*q*) may be paid a reasonable remuneration, and yet are specially exempted from the disqualification otherwise incident to the holding of an office of profit in the gift or disposal of the borough or county council. Again, the councils of all boroughs which enjoy the ancient privilege of being counties in themselves are required to appoint in every year on the ninth of November a fit person to execute the office of sheriff for the borough (*r*); but the sheriff so appointed is not disqualified from membership of the borough council (*s*).

In connection with this disqualification arising from the holding of a paid or profitable office in the gift or disposal of the local authority, a provision in the Local Government Act, 1933, which introduces a new principle into the law, may usefully be noticed. This not only prevents a local authority from appointing one of its members to any paid office—a provision which could easily be evaded by resignation of membership of the authority immediately before appointment—but debars a person who has been a member of a local authority from being appointed by that authority to any paid office for twelve months after he has ceased to be a member (*t*).

(*o*) See below, p. 108.

(*p*) Local Government Act, 1933, § 18.

(*q*) *Ibid.*, § 3.

(*r*) Municipal Corporations Act, 1882, § 170. The city of Oxford, though not a county in itself, also has the anomalous distinction of appointing its own sheriff.

(*s*) Employment by the council in a civil defence capacity "during the period of the present emergency" is no disqualification (Local Government Staffs (War Service) Act, 1939, § 10).

(*t*) Local Government Act, 1933, § 122. And even if the member is prepared to give his services in an honorary capacity, it has been held that

(ii) **Bankruptcy or making a composition with creditors** operates as a disqualification for membership of a local authority. In any event this disqualification ceases after five years from the time when the bankrupt receives his discharge or the terms of the composition or arrangement are fulfilled. Exceptionally the disqualification terminates earlier when the bankruptcy is annulled or the bankrupt is discharged with a certificate that the bankruptcy was caused by misfortune without any misconduct on his part, or when a debtor making a composition or arrangement with his creditors discharges his debts in full.

(iii) **Receipt of poor relief within twelve months before election or at any time since election** causes a disqualification. Before the coming into operation of the Local Government Act, 1933, this disqualification had no application to members of a non-county borough council, but it now applies uniformly to all local authorities. The disqualification produced by the receipt of poor relief is subject to an exception first introduced by the Local Government Act of 1929. The extension of the scope of public health legislation came to mean that many services provided by local government which had formerly been administered solely as part of the poor law were also covered by the notion of public health: the two services had come to overlap. As part of a general policy of softening the rigours of the poor law and removing the recipients of public services from the stigma of pauperism, the Local Government Act, 1929 (*u*), provided that the receipt of certain types of poor relief (*v*) should not operate as a disqualification.

the office is a paid office: *A.-G. v. Ulverston Urban District Council* [1944] Ch. 242; [1944] 1 All E.R. 475.

(*u*) Compare also its provisions permitting local authorities to provide all forms of assistance, which can be provided other than under the poor law, in such other ways: § 5. See below, p. 675.

(*v*) Medical or surgical treatment, whether or not within an institution, or relief which could be granted under the Blind Persons Act, 1920: Local Government Act, 1929, § 10; now re-enacted in the Local Government Act, 1933, § 59.

(iv) **Surcharge by a district auditor to an amount exceeding five hundred pounds** within five years before election or since election produces a disqualification (*w*).

(v) **Conviction in the United Kingdom of any offence and sentence of imprisonment for not less than three months without the option of a fine** operates as a disqualification when it occurs within five years before election or since election. But the period is only reckoned from the day on which the possibility of appealing lapses, or, if an appeal is actually brought, from the day on which it fails. In respect of this disqualification the Local Government Act, 1933, made some alteration in the law, in general applying uniformly the principles previously applied to district and parish councils.

(vi) **Corrupt and illegal practices.**—Disqualification is produced in several cases by the enactments relating to corrupt and illegal practices at elections (*x*).

It will be noticed that all the above cases with the exception of the first (*y*) apply not only to prevent persons disqualified by them from being elected as members of local authorities, but also to cause the vacation of the seat of any person already a member of a local authority who after election becomes disqualified, as for instance by becoming bankrupt or by receiving poor relief (*z*). It has, however, been somewhat inconveniently held that the disqualification produced by conviction for an offence within five years before election or since election is so expressed as to make conviction *before* election a disqualification for election only. The result of this decision is that where a convicted person in fact is elected, and his election is not challenged

(*w*) See, as to the district auditor's powers of surcharging and their effect in producing a disqualification, below, pp. 203 and 207.

(*x*) See below, pp. 114 and 117.

(*y*) Because the Local Government Act, 1933, § 122, prevents a member of a local authority from being eligible for appointment to a paid office by the authority until he shall have ceased to be a member for twelve months. See above, p. 103.

(*z*) See below, p. 119, as to the proceedings available for testing the qualification of a member of a local authority.

by the appropriate method within the time available for that purpose, he is not in any way disqualified for continuing to act as a member (a). If the reasoning on which this decision is founded is correct, it seems equally applicable to the disqualification arising from receipt of poor relief and surcharge by a district auditor, while conceivably it may even apply to bankruptcy or composition with creditors.

4. Conduct of Local Government Elections : Election of Councillors.—We have now seen who may elect the members of local authorities, and who may be elected to such offices. It is now necessary to consider the machinery by which these two classes are brought together, or, in other words, the law governing the conduct of local government elections and the settlement of disputes arising out of their holding. In this matter pre-eminently local government in England has been “municipalised.” The law governing county council elections was directly borrowed from the Municipal Corporations Act, 1882 (b), and the Election Rules prescribing the procedure at elections of district and parish councillors (c) were drafted so as to follow, with modifications, the municipal model. The Local Government Act, 1933, preserved this distinction by which the law governing elections to county and borough councils is contained in statutory enactment, while the elections to district and parish councils are governed by Election Rules made by the Home Secretary (d). It will be convenient, therefore, to confine our attention primarily to the law governing borough elections, noticing in each case where important differences exist in the case of the other local authorities.

Casual Vacancies.—Elections of councillors may occur either on the ordinary occasions when the term of office of

(a) *Bishop v. Deakin* [1936] Ch. 409 ; [1936] 1 All E.R. 255 ; Digest Supp.

(b) Local Government Act, 1888, § 75.

(c) Under the Local Government Act, 1894, §§ 20, 23, 24 and 48.

(d) Local Government Act, 1933, §§ 40 and 54. These Election Rules governing the election of councillors of urban district (S.R. & O., 1934, No. 545), rural district (S.R. & O., 1934, No. 546), and parish councils (S.R. & O., 1934, No. 1318), closely follow the Local Government Act, 1933, 2nd Schd., with minor alterations particularly as to dates.

existing councillors comes to an end, or when for any reason a casual vacancy occurs. This latter event, leading to a bye-election, may happen in a variety of ways (*e*). In the first place a councillor may die, cease to be qualified, or become disqualified, causing a casual vacancy of his seat. Secondly, any member of a local authority may resign. This may be done by giving a written notice of resignation to the clerk in the case of county, borough or district councils, to the chairman of a parish council in the case of a parish councillor, or to the parish council or meeting if it is the chairman of either of the two last bodies who wishes to resign his office (*f*). Again, membership of a local authority is obviously intended to enable the discharge of public duties, and the law imposes the penalty of vacation of office upon a person who fails to discharge them adequately. Formerly the forfeiture of office caused by absence was by no means uniform in the case of the various local authorities. The law governing borough and county councils imposed the penalty upon members absent from the borough for six months (*g*), or from the county for twelve months (*h*). On the other hand, a member of a district or parish council vacated his seat by six months' absence from meetings of the council (*i*). The Act of 1933 adopted the principle, previously applied only to district and parish councils, that absence from meetings should be the criterion in all cases, with the exception of the mayor of a borough, who, by reason of the many claims of his office, may properly be required to be continuously available within the borough. The result of this change is that a member of a local authority who fails throughout six consecutive months to attend any meeting of the local authority (*j*), unless his absence was due to some

(*e*) See Local Government Act, 1933, § 65.

(*f*) Local Government Act, 1933, § 62. The payment of a fine on resignation, as was formerly necessary under the Municipal Corporations Act, 1882, § 36, is no longer required.

(*g*) Municipal Corporations Act, 1882, § 39.

(*h*) Local Government Act, 1888, § 75.

(*i*) Local Government Act, 1894, § 46.

(*j*) For this purpose the meetings of committees, sub-committees, joint boards, etc., count as meetings of the local authority.

reason approved by the local authority (*k*), ceases to be a member of the authority in question. Exceptionally a mayor continuously absent from the borough, except in case of illness, for a period exceeding two months ceases to hold the office of mayor (*l*). Lastly, where a borough or county councillor is elected to be an alderman he vacates his seat as councillor (*m*), though this does not apply in any case where a member of a local authority is elected to the merely annual office of mayor or chairman.

Where a casual vacancy occurs an election is, with two exceptions (*n*), held in exactly the same manner as are ordinary elections (*o*), the member elected at a bye-election holding office until the date upon which the person, whose vacant seat he was elected to fill, would regularly have retired (*p*). The two exceptions prevent, in the cases to which they apply, the necessity of holding a bye-election to fill a casual vacancy. The first is of general application to all local authorities, and applies where a casual vacancy in the office of councillor occurs within six months before the date on which the term of office of the member causing the vacancy would ordinarily have ended. In this case the seat is allowed to remain unfilled until the next ordinary election. The second exception is confined to the case of a casual vacancy occurring on a parish council; here no new election is held, but the parish council is itself required to fill the vacancy, the principle of co-optation being applied so as temporarily to supersede that of representation (*q*).

Returning Officer.—In the holding of local government elections the control of nearly all matters is in the hands of the returning officer. In the case of elections of county councillors

(*k*) There is also an exemption in favour of members of any of the Forces of the Crown and other persons during war or emergency.

(*l*) Local Government Act, 1933, § 63. (*m*) *Ibid.*, §§ 6 and 21.

(*n*) As to the special case of casual vacancies occurring whilst the Local Elections and Register of Electors (Temporary Provisions) Act, 1939, remained in force, see above, p. 92.

(*o*) Local Government Act, 1933, §§ 66 and 67. (*p*) *Ibid.*, § 68.

(*q*) *Ibid.*, § 67. As to filling casual vacancies in the offices of chairman, mayor or alderman, see § 66.

this post is held by a person appointed by the county council (*r*). In elections to district councils under the Election Rules, the clerk of the council is returning officer (*s*), and in rural parishes the clerk of the rural district council, though the chairman of the parish meeting has important functions to perform which elsewhere are discharged by the returning officer (*t*). In boroughs the position varies according as the borough is, or is not, divided into wards. If the borough has no wards, so that the election is held for the whole area, the mayor is returning officer ; if it is divided into wards the aldermen act as returning officers, each ward being allotted to a particular alderman by the council (*u*).

Nomination.—The dates for holding local government elections vary for the different local authorities. In the case of parish and district councils elections must be held so that the newly elected councillors may come into office on the 15th of April ; in the case of borough councils this date is the 1st of November ; while in the case of county councils it is the 8th of March (*v*). The first step to be taken is the giving of such public notice as the law prescribes of the date of the proposed election. The next important stage is the nomination day ; that is, the day upon which the persons intending to be candidates come forward and announce their intention of standing for election. An individual though properly qualified cannot become a candidate without obtaining a minimum of support from the electorate, even at this early stage. In the case of county councils and of borough and urban district councils nominations must be in writing signed

(*r*) Except where an electoral division is wholly within the boundaries of a non-county borough, in which case the mayor is returning officer, but must act under the directions of the county returning officer : Local Government Act, 1933, § 14.

(*s*) Urban District Councillors Election Rules, 1934 (S.R. & O., 1934, No. 545), r. 1 ; Rural District Councillors Election Rules, 1934, (S.R. & O., 1934, No. 546), r. 1.

(*t*) Parish Councillors Election Rules, 1934 (S.R. & O., 1934, No. 1318), r. 2, and 1st Schd., Pt. I.

(*u*) Local Government Act, 1933, § 28.

(*v*) Local Government Act, 1933, §§ 8, 23, 35 and 50. For the detailed time-table in the case of county and borough elections, see *ibid.*, 2nd Schd., Part II.

by a proposer, a seconder, and eight other persons, all being local government electors for the area in question (*w*), while in the case of rural district and parish councils signature by a proposer and seconder is alone required (*x*).

Adjudication on Nomination Papers.—On receipt of the nomination papers it is obviously necessary that there should be some person with power to adjudicate upon their validity, so that it may be known what candidates are standing for election. This duty is performed in the case of county and district council elections by the returning officer, in boroughs by the mayor and in the case of parish council elections by the chairman. Formerly in the case of borough and county council elections there was a personal hearing of objectors and the officer charged with the duty of adjudicating was strictly limited to objections put before him; he could not reject a paper of his own motion. The Local Government Act of 1933, however, extended the principle, formerly applicable only to district and parish council elections, to the adjudication upon nomination papers of candidates for county and borough councils. The officer adjudicating is required to examine the nomination papers and decide what candidates have been validly nominated, giving notice of his decision to each candidate (*y*). In other words, he may reject a paper as invalid without waiting for formal objection to be made to him. But he is prevented from rejecting a paper upon any ground except one apparent on the face of it. He may reject because the paper is not in the proper form, or because it is not properly filled up, or because the persons signing it are not local government electors for the area in question; but he cannot reject it on an extrinsic ground, such as that the person nominated is disqualified (*z*).

(*w*) Local Government Act, 1933, 2nd Schd., Part I, para. 2.

(*x*) Rural District Councillors Election Rules, 1934 (S.R. & O., 1934, No. 546) and Parish Councillors Election Rules, 1934 (S.R. & O., 1934, No. 1318).

(*y*) Local Government Act, 1933, 2nd Schd., Part I, para. 5.

(*z*) *Pritchard v. Mayor, etc., of Bangor* (1888) 13 App. Cas. 241; 33 Digest 65, 394.

In the adjudication of the nomination papers a principle of election law of general validity comes into play. It is obvious that on several occasions quick decisions have to be made by the returning officer—as here, on the validity of nomination papers, or on the count of a poll when doubtful voting papers have to be adjudicated upon. To allow an appeal to lie from every such decision to the Courts would make it a practical impossibility ever to complete elections in due time, and yet to exclude all appeal might open the door to grave abuses. In consequence a compromise has been adopted. The decision on the validity of a nomination or voting paper, if it holds the paper to be good, is final and subject to no appeal; if, on the other hand, it holds the paper to be bad, there is no immediate appeal to the Courts, so that the conduct of the election is not held up, but it may be reviewed afterwards in proceedings by way of election petition (*a*).

Method of Election.—The next stage after the receipt of the nominations is the holding of the election, and any one of three possible courses may have to be adopted, only one involving the necessity for a poll. In the first place, if the number of nominations made exactly corresponds to the number of vacancies to be filled, the returning officer on the election day has only to declare the nominated candidates to be duly elected. Secondly, however, if the number of nominations is less than the number of vacancies, the returning officer similarly declares the candidates to be elected, and the remaining vacancies are filled by the retiring councillors who at the previous election received the highest number of votes. In the case of equality in the number of votes cast for two or more retiring councillors thus called upon to refill the vacancies

(*a*) Local Government Act, 1933, 2nd Schd., Part I, para. 5. See below, p. 115, as to election petitions. The Local Government Act, 1933, 2nd Schd., Part I, para. 8, introduced a principle designed to prevent frivolous candidatures. If a candidate is nominated for more than one electoral area for the same authority, he must withdraw all the nominations except one, under pain of finding that all the nominations become void. In this way he must indicate for which one electoral area he wishes to stand.

created by their own retirement, the choice is determined by the drawing of lots.

There is, however, a third possibility, one more usual than either of the two just considered : the number of nominations may exceed the number of vacancies. In this case on the election day a poll of the electors must be held by ballot (*b*), and, after the count of the voting papers and any necessary adjudication by the returning officer upon spoilt or doubtful papers, the candidate receiving the highest number of votes is declared by the returning officer to be elected.

Parish Council Elections.—The peculiarities in the conduct of elections for parish councils are so marked as to justify separate treatment. Parish councillors are normally elected at the parish meeting. Nomination papers signed by two local government electors, as proposer and seconder, are delivered to the chairman of the meeting (*c*), at least fifteen minutes being allowed for this purpose. The chairman then adjudicates on the validity of the papers received by him and announces the names of the persons validly nominated. An opportunity must then be given for putting questions to the candidates. If the number of candidates does not exceed the number of vacancies, the chairman forthwith declares them to be elected, but in other cases an election is immediately held, the names of the candidates being put separately to the meeting and the voting being by show of hands. The successful candidates are then declared by the chairman to be elected, but a poll may be demanded by any five electors or one-third of those present at the meeting (whichever is the smaller number), in which case a poll by ballot must be conducted in the ordinary way (*d*). But the Local Government Act, 1933, introduces an alternative : it permits the county council at the request of the parish council or meeting to order the parish

(*b*) Local Government Act, 1933, 2nd Schd., Part I, para. 9. As to the conduct of the poll, see *ibid.*, Part III.

(*c*) The chairman of the parish council cannot preside if he is himself a candidate.

(*d*) Local Government Act, 1933, § 51, and 3rd Schd., Part IV, para. 5; Parish Councillors Election Rules, 1934 (S.R. & O., 1934, No. 1318).

councillors to be elected by the more generally utilised system of nomination followed if necessary by a poll (*e*).

Election of Aldermen.—The election of aldermen in those two authorities, the borough council and the county council, of which they form parts, is of course conducted on different principles. As the councillors are the sole electors (*f*), there is no need for the complicated machinery of nomination and election required in the popular election of the councillors themselves. At the meeting of the council on the prescribed day each councillor is entitled to vote “for any number of persons, not exceeding the number of vacancies to be filled, by signing and delivering at the meeting” to the chairman of the meeting “a voting paper containing the full names and places of residence and descriptions of the persons for whom he votes.” The chairman then “shall openly produce and read them, or cause them to be read” (*g*), and declare the persons, not exceeding the number of vacancies, who have received the greatest number of votes to be elected (*h*).

Acceptance of Office.—A person elected to membership of a local authority, or to an office therein, such as chairman or mayor, is required to make a written declaration of acceptance of office (*i*) which must be delivered to the clerk of the council within two months from election. Failure to make and deliver the declaration within the prescribed time has the effect of causing a vacancy (*j*). Formerly the law was somewhat different. In the case of borough councils there was no requirement that a person elected should have consented to be nominated, and if he failed to make the appropriate declara-

(*e*) Local Government Act, 1933, § 51.

(*f*) *Ibid.*, §§ 6, 7, 21 and 22.

(*g*) This prevents a secret ballot, for the whole paper, including the signature of the voter, must be openly read: *Re Barnes Corporation, Ex parte Hutter* [1933] 1 K.B. 668; Digest Supp.

(*h*) Local Government Act, 1933, §§ 7 and 22.

(*i*) In the case of parish councils at a meeting of the council, and in other cases before two members of the council, the clerk, a justice of the peace or magistrate in any part of His Majesty's dominions, a commissioner for oaths, or a British consul.

(*j*) Local Government Act, 1933, § 61.

tion of acceptance of office he was liable to a fine (*k*). Persons elected to county and district councils were not liable to a fine for non-acceptance of office unless they had consented to their nomination (*l*). The Act of 1933 effected a simplification of both systems, for, on the one hand, consent to nomination is now required in all cases (*m*), and, on the other hand, no fines are payable for failure to make the necessary declaration.

5. Election Offences.—We have described above the procedure followed in local government elections, but before leaving the subject it remains to be noticed that the law prohibits and penalises certain undesirable practices by candidates and others, and makes provision for reviewing the conduct of elections. Though strictly these two matters are distinct they are yet so intimately connected in practice that it is convenient to treat of them together. The matter is extremely complex and only the outlines of the subject can be here attempted. The law on the subject is contained in the Municipal Corporations Act, 1882, Part IV; the Municipal Elections (Corrupt and Illegal Practices) Acts, 1884 and 1911, applied to county council elections by the Local Government Act, 1888, § 75, and to district and parish council elections (subject however to modifications made by the Election Rules) by the Local Government Act, 1894, § 48. These provisions are left untouched by the Local Government Act, 1933 (*n*). We may again confine our attention to the case of elections to borough councils.

As in the analogous case of parliamentary elections the law pronounces certain types of conduct in connection with local government elections to be election offences, and renders liable to punishment the individuals committing them, whether candidates, their agents, or third parties. These election offences are divided into two classes. First in

(*k*) Municipal Corporations Act, 1882, §§ 34 and 35.

(*l*) Local Government Act, 1888, § 75; Local Government Act, 1894, § 48.

(*m*) Local Government Act, 1933, 2nd Schd., Part I, para. 3.

(*n*) *Ibid.*, §§ 40 and 54.

degree of heinousness come "corrupt practices," which include bribery, personation, treating, and undue influence covering such things as threats of injury or harm designed to influence the voting. Secondly, a series of less grave offences are grouped under the name of "illegal practices." These include the making of certain prohibited payments or contracts and the failure to make certain prescribed returns, declarations, etc.

Disqualification.—These two classes of corrupt and illegal practices constitute a part of the ordinary criminal law. The commission of any of them renders the person guilty liable to prosecution in the ordinary criminal courts, when prescribed punishments may be imposed. They have, however, two further consequences. In the first place a person convicted of an election offence comes under certain disqualifications. If convicted of a corrupt practice the guilty party is incapacitated for seven years from voting for, or being elected to any local authority. A person convicted of an illegal practice, however, comes under a less heavy disqualification, and is only incapacitated for five years from voting at any election held in the area in question. In the second place, as we shall shortly see, the question whether election offences have been committed is of importance on a review of the proceedings under an election petition.

6. Election Petitions.—A person declared to be elected to a local authority is deemed to be duly elected until the contrary is shown, and an election is deemed to have been good and valid unless questioned by election petition within the period of time within which such a proceeding may be brought (o).

An election petition in connection with a local government election may be presented within periods varying from fourteen to twenty-eight days (according to the particular ground on which it seeks to question the election) to the King's Bench Division of the High Court, either by any four electors of the

area concerned or by a candidate (*p*). It must state the ground upon which the election is challenged, which may be :

- (i) That the election was avoided by general bribery, treating, undue influence, or personation, or
- (ii) that the election was avoided because corrupt or illegal practices were committed by the successful candidate or his agents in connection with the holding of the election, or
- (iii) that the elected candidate was disqualified at the time of the election, or
- (iv) that the successful candidate was not duly elected by a majority of the votes lawfully cast, or
- (v) that the result of the election may reasonably be supposed to have been affected by extensive illegal practices (*q*).

Election Court.—The election petition is tried by an election court, consisting of a commissioner appointed by the Judges of the High Court who for the time being are on the *rota* for the trial of parliamentary election petitions required to be set up by the Parliamentary Elections Act, 1868 (*r*). Great care is taken to prevent even the appearance of anything short of absolute impartiality characterising the composition of the election court. The commissioner must be a barrister of no less than fifteen years standing ; he must not be a member of Parliament, nor may he hold any office of profit under the Crown except that of recorder, so long as his recordership is not that of the borough to which the petition relates. Moreover, he must not be resident in the area concerned, nor must he even practise on the circuit in which that area lies.

The petition is tried by the commissioner without a jury in

(*p*) Municipal Corporations Act, 1882, § 88 ; Municipal Elections (Corrupt and Illegal Practices) Act, 1884, § 25.

(*q*) Municipal Corporations Act, 1882, § 87 ; Municipal Elections (Corrupt and Illegal Practices) Act, 1884, §§ 8 and 18.

(*r*) See now Supreme Court of Judicature (Consolidation) Act, 1925, § 67.

an open court held in the area concerned (s), and at the trial the Director of Public Prosecutions must be represented (t). The commissioner's decision is final and not subject to appeal, except that he may at his discretion state a case for the opinion of the High Court upon any point of law arising out of the proceedings, and the High Court may in a proper case direct him to do so. He certifies in writing whether the election is good or bad, and reports to the High Court whether corrupt or illegal practices have been committed (u). This report is passed on to the Attorney-General for his consideration, so that he may decide whether prosecutions should be instituted.

Decision on Petition.—The commissioner may decide that the election itself was good and determine who was properly elected, or he may hold that the election itself was bad (in which case the law requires that a new one shall be held) on any of the grounds upon which a petition may be presented. For instance, the election of a particular candidate may be upset on the ground that the candidate elected was at the time disqualified, or that he was not duly elected by a majority of the votes lawfully cast, or because of the presence of general bribery, treating, etc., at the election. The mere commission of corrupt or illegal practices at the election is not *ipso facto* a ground for holding the election to be bad ; only in two cases will this result follow. If the commissioner comes to the conclusion that the corrupt or illegal practices, whoever committed them, affected the result of the election, he must decide in favour of the petitioners (v). Similarly even though he does not consider that the result of the election was affected, nevertheless if the corrupt or illegal practices were committed by, or with the knowledge of the successful candidate or his agent, the election is avoided, and in this case the decision of

(s) Municipal Corporations Act, 1882, § 92 ; Municipal Elections (Corrupt and Illegal Practices) Act, 1884, § 36 (2).

(t) Municipal Elections (Corrupt and Illegal Practices) Act, 1884, § 28.

(u) Municipal Corporations Act, 1882, § 93 ; Municipal Elections (Corrupt and Illegal Practices) Act, 1884, §§ 3 and 8.

(v) Municipal Corporations Act, 1882, § 81 ; Municipal Elections (Corrupt and Illegal Practices) Act, 1884, § 18.

the election court imposes upon the guilty candidate certain disqualifications (*w*). It is sufficient here to note that if the commissioner reports that corrupt practices have been committed by, or with the knowledge and consent of the candidate, the latter is disqualified for life from being elected a member of the local authority in question, and for seven years from being elected to, or voting for, any local authority. If the offence has been committed by the candidate's agent, the candidate is only disqualified from being elected to membership of the particular local authority in question for a period of three years (*x*). If, however, the report solely deals with illegal practices, then, whether the offence has been committed by the candidate himself or by his agents, he is disqualified from being a member of the local authority in question only during the period in respect of which the invalid election was held, but, if the candidate is himself found guilty of committing the illegal practice, he is also incapacitated for five years from voting at elections for local authorities in the area (*y*). If a person other than a candidate is found guilty of a corrupt practice he is disqualified for seven years (*z*), or, if he is found guilty of an illegal practice, the disqualification continues for five years (*a*).

Quo Warranto.—Another method by which formerly the lawfulness of an election might in some cases be indirectly determined was by an information in the nature of a *quo warranto* filed in the King's Bench Division (*b*). In spite of the provisions of § 87 of the Municipal Corporations Act, 1882, which provided that where an election petition was available an election should not be questioned in any other way, it was held that, where the substance of the proceedings was to question the lawfulness of acting in an office and not to challenge the validity of the election to that office, a *quo warranto* was

(*w*) Municipal Elections (Corrupt and Illegal Practices) Act, 1884, §§ 3 and 8.

(*x*) *Ibid.*, §§ 2 and 3; Corrupt and Illegal Practices Prevention Act, 1883, § 6.

(*y*) Municipal Corporations (Corrupt and Illegal Practices) Act, 1884, §§ 7 and 8.

(*z*) *Ibid.*, § 2; Corrupt and Illegal Practices Prevention Act, 1883, § 6.

(*a*) Municipal Corporations (Corrupt and Illegal Practices) Act, 1884, § 7.

(*b*) See below, p. 387.

a proper remedy, even though the disqualification which was alleged was one commencing before the election but still continuing to be operative (c). In any event this form of procedure was available for attacking the right of a person to hold an elected office where the disqualification only arose after election.

The Local Government Act of 1933 has, however, prevented the remedy of *quo warranto* from being available in either of these two cases. In the first place the Act prevents an election from being questioned except by election petition, even where a disqualification is the ground upon which proceedings are based (d). Secondly, the Act introduced a new form of procedure for questioning the right of a person to act in an elected office, and expressly forbids the bringing of any other proceedings, whether by way of *quo warranto* or otherwise, against a member of a local authority to challenge his right to act (e).

New Form of Procedure in respect of Qualification.

This new procedure, for questioning the right of a person to act as a member of a local authority or as mayor or elective auditor of a borough, is only applicable where it is alleged that he is disqualified (f), or is not qualified (g), or has vacated his seat, through such events as failure to attend meetings (h). Proceedings may only be instituted by a local government elector for the area of the local authority concerned. If the complaint rests upon the allegation that the defendant has actually acted in the office for which it is asserted that he is unqualified, the complainant is, in the first place at any rate, given a choice of courts. He may either institute proceedings in a court of summary jurisdiction, where if he is successful the defendant may be fined, or he may bring his proceedings in the High Court, where judgment may be given in the form of

(c) *R. v. Beer* [1903] 2 K.B. 693; 4 Digest 177, 1647. Contrast now *Bishop v. Deakin* [1936] Ch. 409; [1936] 1 All E.R. 255; Digest Supp., above, p. 106.

(d) Local Government Act, 1933, § 71.

(e) *Ibid.*, § 84.

(f) See above, p. 101.

(g) See above, p. 99.

(h) See above, p. 107.

a declaration and injunction in addition to a fine. Summary proceedings, however, are only intended to be used where a plain and simple case occurs, and more complicated cases involving difficult points of law should be brought directly before the High Court. In order to render this principle effective, the Act provides that, where proceedings are commenced in a court of summary jurisdiction which more properly should be dealt with in the High Court, the magistrates may on that ground discontinue the case, or the defendant may apply to the High Court for an order directing the magistrates to discontinue the case. In either event the proceedings must be commenced within six months; and it has been held that the six months' period commences to run from the first occasion on which the defendant acted in the office to which it is alleged that he is not entitled (*i*). This decision produces the strange result that, if no proceedings are brought within six months from the time when he first acted in the office, a person wholly unqualified, for instance, cannot subsequently be challenged.

There may, however, be cases where it is desirable that the validity of a mere claim to act as a member of a local authority may be determined before the defendant has actually performed any act in the office he asserts to be his. In such a type of case a fine is obviously entirely inappropriate, and the Act, in consequence, only permits proceedings to be brought in the High Court. If the fact of disqualification is proved the appropriate relief is by way of declaration and injunction (*j*).

(*i*) *Bishop v. Deakin* [1936] Ch. 409; [1936] 1 All E.R. 255; Digest Supp.

(*j*) Local Government Act, 1933, § 84.

CHAPTER V

THE PRACTICAL WORKING OF LOCAL AUTHORITIES

Relation between Law and Practice.—Such a book as Dicey's *Introduction to the Study of the Law of the Constitution* clearly shows that a full understanding of the English Constitution is impossible without a consideration of the practices or conventions universally observed by statesmen while engaged in the practical work of government. In the same way a mere exposition of the legal framework of rules governing the composition of local authorities would by itself be valueless, if not positively misleading, to the student of English local government. But in the case of local authorities many of the matters, which in the case of the Central Government are left to be determined by mere conventions, are prescribed by the law. Local authorities are not only governed by strict legal rules as to their composition and powers, but also in large measure as to the procedure they are required to follow. A knowledge of the practical working of local authorities as administrators of local government is essential as a corrective to their consideration as mere legal institutions.

The two vital elements in local administration are formed by the elected members of local authorities on the one hand, and the paid officers employed by those authorities on the other hand. To understand the practical working of local government it is therefore necessary to appreciate the legal rules governing the position both of the elected members and of the officers, and to consider in their light the legal principles and practical rules applied in settling their relation *inter se*.

1. Members of Local Authorities : Former Disqualification for Interest.—It is clear, from what has already been said, that the law provides means for local self-government through elected representatives. Who they are and how they are chosen has been seen above. Little more need here be mentioned of their legal position, save to remember that their public duties impose upon them a position analogous to that of trustees for the electors they represent. But it is an important part of the obligation cast by the law on a trustee, to avoid putting himself in a position in which there may arise a conflict between his duty and his private interest. In the case of members of local authorities the analogy may be pressed even as far as this. The rules governing disqualification for membership are based on the principle that a man's acts or occupation may render him unfit to undertake office as a member of a local authority. Before the Local Government Act, 1933, however, another disqualification existed, caused by interest in a contract made with the local authority (a). But the working of this disqualification proved unsatisfactory in two ways. In the first place, the wording in which it was cast was not exact enough to make it effective in the light of the development, for instance, of the "one-man company" (b); while secondly, it might prove wider than was desirable, preventing the public from enjoying the benefits of the experience of some of its number solely because they were engaged in business (c).

Disability arising from Interest.—The Local Government Act, 1933, attacked this problem of interest in contracts with the local authority from a different angle. No general disqualification from membership is imposed; but a member of a local authority, who has any direct or indirect pecuniary interest in any contract or proposed contract or other

(a) Municipal Corporations Act, 1882, § 12; Local Government Act, 1888, § 75; Local Government Act, 1894, § 46.

(b) See *Lapish v. Braithwaite* [1926] A.C. 275; 33 Digest 67, 405.

(c) In the case of parish councillors this point was foreseen by the Local Government Act, 1894, § 46, which permitted the disqualification to be removed by the county council,

matter (*d*), while retaining his membership, is put under a double obligation. If present at the meeting at which the contract or matter is to be discussed, he must disclose the fact of his interest (*e*), and he is prohibited from taking part in the discussion and from voting on any question arising. Nor is this all, for a local authority is empowered to provide for the exclusion of a member from any meeting at which a contract or matter in which he is interested is to be considered (*f*). Power is given to the Minister of Health, in the case of local authorities other than parish councils, and, in the latter case, to the county council to remove the disability arising from interest, when the number of members so disabled is great enough to impede the transaction of business or where it is in the interests of the inhabitants of the area that the disability should be removed. These disabling provisions not only apply to meetings of a local authority itself, but extend to cover meetings of committees, sub-committees and joint committees (*g*).

2. Officers of Local Authorities.—Obviously, under modern conditions, when so much of the work of local authorities is of a technical and complex nature involving continuous activity, it is essential that, in addition to the elected members of a local authority, paid expert officers should be employed to carry out, under the direction of the councils which appoint them, the day-to-day work of administration. As might be expected, therefore, local authorities are empowered to appoint such officers as may be necessary and pay them such reasonable remuneration as the local authority may determine (*h*).

(*d*) This covers not only a member who, or whose spouse, is an employee, member of a company, or partner of the person with a direct pecuniary interest, but also extends beyond interest arising merely from contracts.

(*e*) He may as an alternative give a general notice to the clerk disclosing the fact of his, or his spouse's, membership of a company, or employment or partnership, to be effective until it is withdrawn.

(*f*) Local Government Act, 1933, § 76. The penalty for failure to comply with the provisions of the section is a fine of £50, but a prosecution may only be instituted by or on behalf of the Director of Public Prosecutions.

(*g*) *Ibid.*, § 95.

(*h*) *Ibid.*, §§ 105, 106 and 107; parish councils may only appoint a clerk and treasurer, the former of whom alone, if not a member of the council, may be remunerated: *ibid.*, § 114.

But this power to pay salaries or wages is not as unlimited as might at first sight appear. The sums paid must be reasonable, having regard to local conditions (*i*), and a retrospective payment for extra work, not made in pursuance of a previous arrangement, is not permissible (*j*). The power to remunerate is not to be construed as a power to make gifts. Further, in some cases the law makes it obligatory upon local authorities to appoint particular officers. For instance, each county council is required to appoint a clerk of the county council, a county treasurer, a county medical officer of health, a county surveyor (*k*) and a chief education officer (*l*); a borough council must appoint a town clerk, a borough treasurer, a borough surveyor, a medical officer of health and a sanitary inspector (*m*), and if a county borough, also a chief education officer (*l*); it is incumbent on an urban district council to appoint a clerk, a treasurer, a surveyor, a medical officer of health and a sanitary inspector, and the same officers, with the exception of the surveyor, must be appointed by a rural district council (*n*). In fact, of course, in addition to these and other obligatory officers, local authorities, by the practical necessity of getting through their work, are compelled to maintain a large staff of employees, ranging from the expert heads of technical departments in large municipalities to the gangs of labourers employed in such work as road repair.

Conditions of Employment : (i) Contractual Terms.

The conditions upon which the officers and servants of local authorities are employed vary greatly, there being, from a legal point of view, three classes of officers. In the first place some are engaged on contractual terms which are mutually agreed between them and the authorities employing them, and which prescribe their salaries or wages and tenure of office. In some cases, however, local authorities are debarred from

(i) *Roberts v. Hopwood* [1925] A.C. 578; 33 Digest 20, 83.

(j) *Re Magrath* [1934] 2 K.B. 415; Digest Supp.

(k) Local Government Act, 1933, §§ 98-104.

(l) Education Act, 1944, § 88.

(m) Local Government Act, 1933, § 106. (n) *Ibid.*, § 107.

contracting on any terms they choose with certain of their officers. In the second class, therefore, fall those officers who are prevented from being appointed on terms securing for them certainty as to their tenure of office.

(ii) **Appointment "during pleasure."**—Many officers are by law required to be appointed "during the pleasure of the council" (o). Where the law required that an appointment should be made on those terms it was held in *Brown v. Dagenham Urban Council* (p) that the local authority was entitled to dismiss the officer without cause or notice, even though an agreement providing for notice to be given had been entered into between the parties. This inconvenient rule has been abolished for the future by § 121 of the Local Government Act, 1933, which provides that, notwithstanding that the law requires an officer to be appointed during the pleasure of a local authority,

"there may be included in the terms on which he holds the office a provision that the appointment shall not be terminated by either party without giving to the other party such reasonable notice as may be agreed."

(iii) **Security of Tenure.**—In the third place the Minister of Health retains wide powers over the appointment and dismissal of certain officers, notably poor law officers (q), and many medical officers of health and sanitary inspectors of boroughs and county districts (r). Officers falling within this class obtain a remarkable security of tenure in their offices, for the local authority appointing them cannot terminate their employment without obtaining the Minister's consent. So far does this stretch that, unless the Minister consents, the local authority cannot even reduce such an

(o) Local Government Act, 1933, §§ 102 (county treasurer), 104 (county surveyor), 105 (general staff of county), 106 (town clerk, borough treasurer, surveyor and general staff of borough), 107 (clerk, treasurer, surveyor, and general staff of district council). Apparently a power merely "to appoint and remove" an officer implies that the appointment is to be "during pleasure": *McManus v. Bowes* [1938] 1 K.B. 98; [1937] 3 All E.R. 227; Digest Supp.

(p) [1929] 1 K.B. 737; Digest Supp.

(q) See below, p. 344: Local Government Act, 1933, § 118.

(r) See below, p. 353: Local Government Act, 1933, §§ 108-110.

officer's salary against his wishes (*s*). In much the same way the clerk of a county council and the county medical officer of health, though appointed during the pleasure of the council, cannot be dismissed from office by their employer without the consent of the Minister of Health (*t*).

Superannuation.—The Local Government Superannuation Acts, 1937 and 1939, require county and county borough councils as well as the larger non-county borough and district councils to maintain contributory pension funds for the provision of superannuation allowances to their permanent officers and to such of their temporary officers and servants as are included within the scheme by general resolution of the authority. Moreover, a temporary officer automatically comes under the scheme on completing two years' service with a local authority. Provision is made for enabling officers and servants within the superannuation scheme of one local authority to carry with them their accrued rights if they obtain employment with another authority. A compulsory retiring age of sixty-five years is imposed, but the employing local authority may extend an employee's service from time to time for maximum periods of one year each. There are in addition certain special superannuation codes relating to employees of particular classes such as the Teachers (Superannuation) Acts, 1918 to 1945. Lastly, many statutes contain special provisions for the transfer of officers or the payment of compensation to those whose employment is affected by the consequent changes produced. For instance, the Local Government Act, 1933 (*u*), contains such provisions applicable to officers affected by alterations of boundaries made under the powers it confers.

Legal Position of Local Government Officers.—Officers and servants must, however, work under the directions of the council, for in general it is the members of the latter

(*s*) *Field v. Poplar Corporation* [1929] 1 K.B. 750; Digest Supp.

(*t*) Local Government Act, 1933, §§ 100 and 103.

(*u*) *Ibid.*, § 150 and 4th Schd. See also the Education Act, 1944, § 98. As to the position of officers who are on war service at a time when the functions on which they were employed are transferred to some other authority, see the Compensation of Displaced Officers (War Service) Act, 1945.

body alone who are responsible both legally and politically to the electors for the policy and activities of the authority.

Legally the officers of local authorities are the servants of the council which appoints them in its capacity of a body corporate, or exceptionally in the case of boroughs of the wider municipal corporation, which can, however, only act through the council of the borough. Officers must, therefore, act in general under the orders of the council, and in this way is the principle of representative government preserved, for the officers come into no direct relation with the electors and are not responsible to them for their acts. This is the general position, but certain officers, though appointed by the local authority, have cast upon them by the law independent duties, in some cases requiring the exercise of their own discretion. No servant can by pleading the orders of his master shelter himself from liability for an illegal act done by him, and this principle applies equally to the officers and servants of local authorities as to the servants of private masters. This principle, however, takes on an exceptional appearance when applied to those local government officers upon whom the law directly imposes independent duties. Thus the treasurer of a borough or county is bound to disobey orders directing him to make an illegal payment, and if he does obey such an illegal order he cannot shelter himself behind the council, but may be personally sued. In *Attorney-General v. De Winton (v)* Farwell, J., speaking of a treasurer under the Municipal Corporations Act, 1882, said :

“ the treasurer is not a mere servant of the council : he owes a duty and stands in a fiduciary relation to the burgesses as a body, he is the treasurer of the borough (s. 18) ; all payments to and out of the borough fund must be paid to and by him (s. 142) ; he has to account to three auditors, two appointed by the burgesses, and one by the mayor (s. 25) ; and although he holds office during the pleasure of the council only (s. 18) this does not enable him to plead the orders of the council as an excuse for an unlawful act.”

(v) [1906] 2 Ch. 106, p. 116 ; 33 Digest 77, 497 ; see *R. v. Saunders* (1854) 3 E. & B. 763 ; 33 Digest 110, 739, for similar remarks about a county treasurer.

Apart from such exceptional cases, officers can only act outside the somewhat vague sphere denoted by the word "policy." They must do what they are ordered to do ; and it is therefore necessary to consider the relations between the councils of local authorities and their officers, and the way in which the actual work of supervision and administration is carried on by the former.

Interest of Officers in Contracts.—In spite of this limitation on the scope of their responsible action it is, however, desirable that an officer employed by a local authority should not be permitted to occupy a position in which his public duty might conflict with his private interest. Consequently, the Local Government Act, 1933, has introduced a provision requiring any officer employed by a local authority or joint committee, who has any direct or indirect pecuniary interest in any contract made, or proposed to be made, with his employer—other than a contract made with him in his own name—to disclose the fact that he is interested by giving notice in writing to the local authority or joint committee (*w*). Similarly an officer is forbidden to exact or accept any fee or reward whatsoever, other than his proper remuneration, under colour of his office. The penalty for failure to comply with either of these provisions is a fine not exceeding fifty pounds (*x*).

Council Meetings.—The law is not content to lay down rules for the election and individual conduct of the elected members of local authorities nor for the appointment and duties of their officers and servants. It goes further and prescribes many of the details of the procedure to be followed by local authorities in the performance of their functions. It requires each council to meet at least four times in each year (*y*). Except, however,

(*w*) The interest which must be disclosed is similar to that which disables a member of a local authority from acting, under the Local Government Act, 1933, § 76.

(*x*) Local Government Act, 1933, § 123.

(*y*) *Ibid.*, 3rd Schd., Part I, para. 1 ; Part II, para. 1 ; Part III, para. 1 ; Part IV, para. 1.

in the case of parish councils (z), meetings are not required to be held in public (a). But by the Local Authorities (Admission of the Press to Meetings) Act, 1908, representatives of newspapers are entitled to attend council meetings, parish meetings, the meetings of joint committees and joint boards exercising delegated powers and the meetings of certain committees with delegated powers. The Local Government Act, 1933 (b), further prescribes the mode of convening council meetings, requiring three clear days' notice specifying the business to be transacted, and in the case of county and borough councils expressly prohibiting the transaction of other business. Again it lays down the quorum necessary for the transaction of business, requires the recording of the names of members present at meetings, and in the case of district and parish councils even provides for the method of voting. The taking of minutes and their confirmation is required and any local government elector for the area of a local authority is entitled, on payment of a fee not exceeding one shilling, to inspect the minutes and to make copies or extracts (c). Subject to the provisions of the Act a local authority may make standing orders for the regulation of its business, but an overriding provision, which most probably invalidates many standing orders requiring special majorities for the decision of particular questions, lays down that "all acts of a local authority and all questions coming or arising before a local authority shall be done and decided by a majority of the members of the local authority present and voting thereon at a meeting of the local authority" (d).

(z) Local Government Act, 1933, 3rd Schd., Part IV, para. 1. Even in this case the parish council may exclude the public from its meetings by express resolution.

(a) *Tenby Corporation v. Mason* [1908] 1 Ch. 457; 33 Digest 61, 370.

(b) 3rd Schd.

(c) Local Government Act, 1933, § 283. The right may apparently be exercised through a skilled agent: *R. v. Glamorganshire County Council. Ex parte Collier* [1936] 2 All E.R. 168; 155 L.T. 31; Digest Supp. Similar rights of inspection are conferred in the case of the minutes of certain committees with delegated powers: e.g. Education Act, 1944, Schd. I, Part II, para. 9.

(d) Local Government Act, 1933, 3rd Schd., Part V, paras. 1 and 4.

Relevant statements made by members of councils at council or committee meetings are protected by a qualified privilege which exempts their speakers from liability for defamation in the absence of malice (*e*). A similar privilege covers fair and accurate newspaper reports of the meetings of councils or their committees, to which press reporters are admitted, but newspapers lose this protection if they fail on request to insert a contradiction or explanation of the report (*f*).

It remains to consider how, within this legal framework of procedural rules, the actual work of local authorities is carried on.

The Cabinet System in the Central Government.—

In the Central Government in the United Kingdom the actual work of government within the legal framework of the constitution is carried on by means of the "Cabinet system." This means that each Department of the Executive Government is supervised by a political head, who, within the sphere of his Department's activities, pursues a definite policy laid down by the Cabinet. The more important departmental heads together form this Cabinet, meeting to decide policy and, when they come to a decision, presenting to the outside world a unanimous and united front. The work of Executive Government, however, requires two things which it is not in the power of the Cabinet collectively, or of its members individually, directly to provide : these are money and legislation which may become necessary in order that the policy of the Cabinet may be pursued. These two essentials are in the control of Parliament and predominantly of the House of Commons. Consequently, the Cabinet can only continue to exist so long as it retains the support of the majority of the members of the House of Commons. Two results follow from this dependence upon the House of Commons : save in

(*e*) *Pittard v. Oliver* [1891] 1 Q.B. 474 ; 32 Digest 118, 1496.

(*f*) Law of Libel Amendment Act, 1888, § 4. This protection does not extend to cover comments in a newspaper on the proceedings at such a meeting ; they must seek protection as fair comment : *Standen v. South Essex Recorders Ltd.* (1934) 50 T.L.R. 365 ; Digest Supp.

exceptional circumstances, the members of the Cabinet must all be members of the same political party, which for the time being is in a majority in the Commons (g); and the Cabinet as a whole is politically responsible to Parliament for the policy adopted by it. Parliament, as it were, while retaining the sole power to tax and make new law, appoints a committee to control the Executive Government and to decide its policy.

Conditions militating against the Introduction of the Cabinet System into Local Government.—Now two features of local government sharply distinguish the method of its administration from the Cabinet system. In the first place the law provides no means for dissolving the councils of local authorities; their members are elected for definite periods, and, short of voluntary resignation, death or disqualification, there can be no new election until those periods have expired (h). On the other hand the Cabinet holds the important power of advising a dissolution of the House of Commons, and so, upon a ministerial defeat, the Cabinet can appeal from that House to the electorate. This lack of any power of compelling a comparable appeal to the local government electors has militated against the introduction of the Cabinet system into the realm of local authorities; though in itself it is not perhaps an insuperable bar, as is shown by a consideration of the position in France, where the Cabinet system is in existence, although the Chamber of Deputies is elected for four years and can never in practice be dissolved (i) before the expiration of that period.

Secondly, the Cabinet system means that the political ministers confine their attention in general to matters of high policy or great importance. Their control over their respective departments is necessarily slight, for they are physically incapable of reviewing every detail of administration. By far the

(g) Except perhaps in times of emergency when a coalition of some sort may be formed.

(h) Or the vague right of "amotion" from corporate office, in virtue of which a member may be expelled for reasonable cause: see *Booth v. Arnold* [1895] 1 Q.B. 571; 33 Digest 69, 422.

(i) Though it is legally possible.

bulk of the work of executive government is carried on by permanent civil servants, often themselves exercising wide powers of discretion and only conforming to the broad principles of policy laid down by their political departmental chiefs. Now in local government there are admittedly officers who to some extent correspond to the members of the central Civil Service, but the work of a local authority is not so vast as that of a Department of State. Moreover as a matter of history the tradition of local government in England requires that a great deal of the actual work of administration should either be done, or at least closely supervised, by the members of the local authority concerned. It must be remembered that the modern local authorities are the successors on the one hand of the justices and of the unpaid compulsorily appointed parochial officers, the surveyors of highways and the overseers of the poor, and on the other hand of the eighteenth-century improvement commissioners. The former necessarily had to do the work of local government themselves, and the latter, though they began the introduction into local government of the paid expert officer, were yet compelled in practice to supervise the work closely. Added to these legacies of former centuries is the fact that the sphere of activity in local government in which policy can operate is not great. Local authorities cannot alter the law, they are not local legislatures but only administrative bodies ; they must take the law which governs them, confers on them powers, or imposes on them duties, from Parliament, and to an increasing extent even within these limits they must perpetually act subject to some degree of control exercised by a Central Department.

Development of the Practice of Local Administration.—In the last fifty years, however, circumstances have conspired to produce a degree of political organisation sufficient to lead inevitably to something like the system of Cabinet Government. In the first place party politics have become important. This serves to lead election contests away from a mere comparison of the personal qualities of the candidates,

provides them with a policy to expound, and has given the party organisations, which have been primarily set up to ensure success at parliamentary elections, an opportunity both of keeping themselves in active exercise and of testing local opinion at frequent intervals. This by itself might not, and indeed in many councils does not, affect more than the conduct of elections, but in the bigger authorities further considerations keep alive the party spirit even after elections are over. In the second place, the vast expansion of the services provided by local authorities, and, in the boroughs particularly, the growth of trading services, such as water, gas and electricity, have made heavy calls upon the time of elected members. Thirdly, the increased representation of the working classes, largely through trade union officers and representatives of other organisations, has enabled them to provide men able to give the time necessary for the performance of local government work. So, too, the extension of the franchise to women has provided another body of citizens able to take a full share of the work of local administration. Lastly, the increase in the size of the councils, particularly in the bigger county boroughs, has rendered the independent member less powerful in the face of organised parties. Moreover, it is difficult to conduct public affairs of considerable complexity if among such a large number of aldermen and councillors there is not at least the semblance of party organisation.

A Rudimentary Cabinet System.—While, therefore, for reasons already stated the complete Cabinet system cannot be applied to local authorities, these changes of circumstance have led in many local authorities to a rudimentary Cabinet being set up. Parties meet at frequent intervals, and always before council meetings, to determine upon the action to be taken with regard to the business which will be transacted at such meetings. If the party is a large one, it almost inevitably follows that a considerable amount of discretion and authority is left with a smaller number who form an executive body. In some cases it is usual for these meetings to be attended by leading

representatives of the party outside the council, who freely join in the deliberations and vote on the policy to be adopted. Party government requires an official head to represent the views of the party in discussions in open council, and he also speaks with the authority of his party in committee meetings. The position of the party leader is recognised in other ways. Some councils set apart special rooms in their town halls for the use of party leaders, and it is not unknown that the services of clerks are provided for their "official" correspondence. Moreover, the demands upon the time of members of councils are increased, both by reason of the greatly extended services to be administered, and by the call to show party loyalty by being present at all meetings and voting as the party has determined (*j*).

Comparison between the Central Government and Local Authorities.—We may now revert to our comparison of the machinery of the State with that of the local authority. Parliament controls the administrative work of every State Department in various ways—by confirming the acts of the Department, by providing the money and controlling very generally the trend of its policy, and by virtually assenting to the appointment of the Minister. But the Minister carries on the Department not as a member of Parliament but as a servant of the Crown. A local authority exercises control over its departments, particularly through finance, but it has not powers analogous to the appointment of Ministers. The elected members must themselves do a great deal of the work of their authorities, which in the Central Government would be left to the discretion of the civil servant. It must not be thought, however, that this involves aldermen or councillors in the actual routine of carrying on their council's everyday work; the staffs of officers and servants are employed for that purpose. But the elected members are obliged to make many decisions and to

(*j*) Cf. Herbert Morrison, *How Greater London is Governed* (1935), for a description of the political organisation of the London County Council where perhaps the system is most fully developed.

give many orders and directions upon matters of comparatively petty importance, which would never come before a political head of a Central Department. To put the matter rather too dogmatically to be completely true, the civil servant, within the bounds of policy prescribed for him, may himself make all decisions which arise in the course of his work ; the local government officer, on the other hand, must make no decision himself ; he must work to orders and refer anything which may arise out of the ordinary course of routine to the elected members of the council who are supervising his department.

The Committee System.—This close supervision over the actual work of local administration means that the business to be performed by the elected members of local authorities is too great in amount adequately to be performed at council meetings. Subdivision is necessary so that the less important matters may be disposed of and the more important matters digested by committees. This “committee system” is the characteristic mark of local government, just as the Cabinet system is typical of the Central Government.

Powers to appoint Committees.—All local authorities are permitted to appoint such committees as they think fit, a general power applicable in any case in which a special enactment does not require or authorise the appointment of a committee (*k*). The committees set up under these general powers may be either “standing committees,” appointed to control generally and continuously some branch of administration, such as finance or sanitation, or “special committees,” created only to deal with some *ad hoc* matter needing temporary consideration. Many other statutes either oblige or authorise local authorities to set up committees to deal with particular matters, and these standing committees are spoken of as “statutory.” Instances of this latter class are afforded by the watch committee which every borough council maintaining a separate police force is compelled to appoint (*l*), the finance

(*k*) Local Government Act, 1933, §§ 85 and 90.

(*l*) Municipal Corporations Act, 1882, § 190.

committee which county councils must appoint to supervise estimates and expenditure (*m*), the standing joint committee for county police (*n*), the education committees (*o*) and the public assistance committees (*p*) which the councils of counties and county boroughs are required to set up.

Composition of Committees.—As to the composition of the committees, through whose agency so much of the work of local authorities is carried on, the position of different councils under their general power to appoint committees formerly varied widely. Borough councils (*q*) and county councils (*r*) were only permitted to set up committees consisting exclusively of their own members; while district and parish councils (*s*) might appoint committees including added members from outside. This is a very valuable principle, for, when wisely exercised, it enables special talent from outside the council to be brought in to deal with particular branches of administration, and so makes for efficiency.

The Local Government Act, 1933, produced a uniform set of provisions governing the composition of non-statutory committees of all local authorities. Finance committees stand apart: they must always consist exclusively of members of the local authorities appointing them. Other committees appointed under the general power conferred by the Act may consist wholly or partly of members of the local authority; but, if it is decided to appoint to such a committee persons who are not members of the council, at least two-thirds of the committee must be members of the local authority (*t*). Rural parishes are, however, in a somewhat exceptional position. Parish councils have the general power to appoint committees which is conferred by the Act on other local authorities. But

- (*m*) Local Government Act, 1933, § 86.
- (*n*) Local Government Act, 1888, § 30.
- (*o*) Education Act, 1944, 1st Schd., Part I.
- (*p*) Poor Law Act, 1930, § 4.
- (*q*) Municipal Corporations Act, 1882, § 22.
- (*r*) Local Government Act, 1888, §§ 75 and 82.
- (*s*) Local Government Act, 1894, § 56.
- (*t*) Local Government Act, 1933, § 85.

they are also required to appoint committees, if requested to do so by the parish meeting, for dealing with functions to be discharged in, or relating to, property held for the benefit of a defined part of the rural parish. In such a case the committee must consist partly of members of the parish council and partly of other persons representing that part of the parish (*u*). Parish meetings of parishes in which there is no parish council may appoint committees which can only be composed of local government electors of the parish (*v*).

Statutory committees, which special enactments require or authorise local authorities to appoint, are governed as to their composition by the terms of the particular enactment and differ widely in this respect. Membership of the watch committee of a borough is limited to members of the council, and the law even prescribes that this committee must not exceed in number one-third of the council and that it shall always include the mayor (*w*). Similarly the finance committee of a county council must be appointed exclusively from among the members of the council (*x*). On the other hand many statutes dealing with particular services have adopted the idea of the inclusion of persons, who are not members of the local authority, among the members of the committees which they require or authorise the local authority to appoint (*y*). A further variant is the requirement that a committee for maternity and child welfare must include women among its members (*z*).

Relations between Councils and their Committees.—

It remains to notice the relations between the various types of committees, which local authorities are empowered or required to appoint, and the appointing councils. In other words, to what extent does the council retain control over the activities of its committees, and how is this control effected?

(*u*) Local Government Act, 1933, § 89.

(*v*) *Ibid.*, § 90.

(*w*) Municipal Corporations Act, 1882, § 190.

(*x*) Local Government Act, 1933, § 86.

(*y*) *E.g.* Education Act, 1944, Schd. I, Part II.; Rating and Valuation Act, 1925, § 18; Poor Law Act, 1930, §§ 4 and 5.

(*z*) Public Health Act, 1936, § 201.

To these questions there are three possible answers, and each possibility has on different occasions been adopted by the Legislature.

(i) **Acts requiring Approval.**—In the first place, the committee may be granted no executive powers at all. It must examine the questions which come before it and find only a tentative solution, which remains merely conditional until the council itself has adopted it : it can merely recommend. In legal phraseology, in such cases the acts of the committee must be approved by the council which appoints it before they can legally be put into force. This was formerly the condition under which the committees of borough councils and, in general, of district and parish councils had to work (*a*). In practice, of course, a rigid adherence to this requirement would be impossible, as it would mean that all the work done by the committees would have to be performed over again at the following council meeting, so that, except for the value to be obtained by having the matters concerned previously digested in committee, little advantage could be derived from their appointment. Though in these cases the councils were prevented from granting executive powers to their committees, the standing orders—which all local authorities are empowered to frame and which form a code of internal procedure governing the proceedings of the council, its committees, its officers and its administrative business—usually went a long way towards conferring something like executive power upon the committees appointed. This was frequently done by provisions in standing orders permitting a large number of routine acts of committees to be formally approved by the council, and requiring only certain matters involving exceptional expenditure or questions of principle to be specially sanctioned.

(*a*) Municipal Corporations Act, 1882, § 22 ; Local Government Act, 1894, § 56. This does not refer to committees required to be set up under Acts dealing with particular services, but to the committees appointed by these authorities under their general powers. Committees of parish meetings of parishes in which there is no parish council must still submit their acts for approval : Local Government Act, 1933, § 90.

Where committees still work under these conditions and such standing orders are in force, it is usual for the chairman of the committee at the next council meeting to move that the minutes or reports and recommendations of the committee, covering all the routine work, be approved, and this motion is formally passed (b). At the same time, to ensure proper publicity, provision is generally made for the circulation to all members of the Council before its meetings of copies of the committees' minutes, reports and recommendations, and for facilities for councillors to inspect the actual minutes.

(ii) Statutory Committees with Executive Powers.—

Secondly, however, some statutory committees have executive powers conferred upon them in such a way that they alone and not the council appointing them can exercise the powers ; the council cannot effectively express even disapproval of the way in which the committees have acted. The committee in such cases is the real local authority for the service under its control. The most striking instances of committees standing in this relation to the councils appointing them are found in connection with the police service. Thus the standing joint committee in relation to the county force can even compel the county council to raise for it such money as it requires (c). In boroughs maintaining their own police forces the watch committee is in effect the police authority for the borough, and as such its acts do not require confirmation by the council, though the council retains financial control (d). In these cases the committees do not seek the

(b) When no formal vote is taken on a matter, all members present, at any rate if they do not clearly indicate their dissent, are to be treated as voting for the resolution : *Rex v. Hendon Rural District Council*. *Ex parte Chorley* [1933] 2 K.B. 696, at p. 703 ; Digest Supp. The members of a council concurring, even without a formal vote of approval, in the recommendation of a committee are bound by the reasons stated in the minutes to have influenced the committee in reaching its decision, and they cannot later attempt to set up the other reasons, if any, which may have privately occurred to them in deciding to concur : *Re Magrath* [1934] 2 K.B. 415 ; Digest Supp.

(c) *Ex parte Somerset County Council* (1889) 58 L.J.Q.B. 513 ; 33 Digest 107, 719 ; Local Government Act, 1888, § 30.

(d) Municipal Corporations Act, 1882, § 190. *R. v. Thompson* (1844) 5 Q.B. 477 ; 33 Digest 83, 538.

approval of the council for their acts, they are only required to report their proceedings.

(iii) **Delegation of Powers.**—A third possibility occurs in the case of those committees to which the appointing councils are authorised to delegate certain executive powers. This case differs from the second in two respects : the powers in the present case are the powers of the council and not directly of the committee ; and the council is not obliged to delegate its powers, it *may* do so, if it thinks fit, subject to such restrictions and conditions as it determines. Moreover in this case all the powers of the council may be delegated to its committees, except only the power to raise a loan or to levy a rate. This limitation is universally imposed in the interests of sound finance upon all powers of delegation to committees. In cases where powers are delegated the committee can act without awaiting the approval of the council, and is at most required to report its proceedings (*e*). In accordance with the maxim *delegatus non potest delegare*, in the absence of the express grant of the right by the council appointing it, the committee cannot in turn delegate its executive powers to a sub-committee appointed by itself (*f*) ; though this does not prevent a sub-committee making recommendations to the committee out of which it is derived, and those recommendations on approval even without discussion become the acts of the committee (*g*).

Apart from the case of certain statutory committees, this power was formerly conferred, with some exceptions, upon county councils (*h*), while district councils might delegate their sanitary and highway powers to committees (*i*).

(*e*) The danger inherent in the delegation of executive powers to committees is that the latter may come to regard themselves as in effect *ad hoc* authorities independent of the councils appointing them. In practice, therefore, fully delegated powers may not be given, or, though technically powers may be fully delegated, it is often the practice to submit committee reports for formal approval by the council.

(*f*) *Cook v. Ward* (1877) 2 C.P.D. 255 ; 42 Digest 724, 1429. Exceptionally the Public Health Act, 1936, § 273, empowers committees set up for the purposes of the Act to appoint sub-committees and to delegate any of their functions to such sub-committees.

(*g*) See *Agnew v. Manchester Corporation* (1902) 67 J.P. 174 ; 33 Digest 61, 375.

(*h*) Local Government Act, 1888, §§ 28 and 82.

(*i*) Local Government Act, 1894, § 56.

The Local Government Act of 1933 made the power of delegation, except in financial matters, applicable to the committees appointed under the general power it confers upon all local authorities (*j*).

Many statutory committees are in the same position, the council required or authorised to appoint them being empowered to delegate all or any of its powers other than those relating to finance. This is sometimes combined with a provision requiring all matters relating to the particular service, except in cases of urgency, to stand referred to the committee, so that, even if the council has not chosen to delegate executive powers, it can only exercise the powers it has retained for itself after considering a report from the statutory committee (*k*).

Administrative Arrangements.—The need for elasticity in the areas within which particular services are administered has led to the introduction of a number of devices, which combine this need with the retention of the uniform framework of general local authorities. Such devices are an answer to critics who point out that the present areas of local authorities are often totally unsuited to enable them to administer a number of different services, each requiring for the maximum of efficiency areas mapped out on diverse principles. As these devices have a close bearing on the committee system in some of its aspects, they may properly be referred to in the present place.

In the first place, the desirability of employing a whole-time medical officer of health prohibited from engaging in private practice, though generally recognised, was often impossible on financial grounds in the case of a district council. This difficulty is met by a provision (*l*), requiring county councils to secure, either by combination of districts or

(*j*) Local Government Act, 1933, § 85; it has no application to a committee appointed by the parish meeting of a parish which has no parish council; *ibid.*, § 90.

(*k*) See, *e.g.*, Education Act, 1944, 1st Schd., Part II, para. 7; Poor Law Act, 1930, § 4; Public Health Act, 1936, § 201 (Maternity and Child Welfare Committee).

(*l*) Local Government Act, 1933, § 111.

otherwise, that district medical officers of health do not engage in private practice. Frequently this duty is discharged by arranging that one medical officer shall be employed by several district councils simultaneously. Similarly, the provision of adequate hospital accommodation for infectious diseases is often beyond the resources of individual county districts, and so the county council is required to make schemes for the provision of such accommodation (*m*). These schemes may provide for the pooling of existing accommodation or its provision on a joint basis, and may even by agreement include adjoining county boroughs. Secondly, in some cases power is given to non-county boroughs and district councils to relinquish their powers in favour of the county council (*n*). In this way a larger area of administration can be obtained which in particular cases may prove to be more efficient than those intended for general use.

Employment of One Local Authority by Another.—Conversely there are certain powers conferred on a larger local authority for making use of the services of a lesser, as if the latter were a committee appointed by the employing council. Examples of this type of power occur in the case of county and district councils. The former are permitted to delegate their powers, in respect of certain matters concerning the districts in question, to the councils of districts situate within the administrative county, so as to employ them as the agents of the county council (*o*).

Parochial Committees.—Rural district councils are empowered to set up "parochial committees" for any "contributory place" (*p*). The appointment of a parochial

(*m*) Public Health Act, 1936, § 185.

(*n*) Town and Country Planning Act, 1932, § 2; Public Health Act, 1936, § 320.

(*o*) Local Government Act, 1933, § 274; which imposed some limitation on the similar power conferred by the Local Government Act, 1894, § 64; see above, p. 52. The concurrence of the district council is necessary.

(*p*) A "contributory place" is (1) a rural parish no part of which is situated within a special purpose area, or (2) a special purpose area, or (3) that part of a rural parish which is not within a special purpose area: Local Government Act, 1933, § 305; Public Health Act, 1936, § 343. For the meaning of "special purpose area," see p. 167.

committee must be made at a specially convened meeting of the rural district council, and if the council refuses to appoint such a committee on receiving a request from a parish council or parish meeting concerned, the latter body may appeal to the Minister of Health, who may order the committee to be appointed. When a parochial committee is set up it may consist either wholly of members of the rural district council or partly of rural district councillors and partly of parish councillors, if the contributory place has a parish council, or, if there is no parish council in the contributory place, it may consist of rural district councillors and local government electors for the area in question. The rural district council which sets up such a parochial committee may delegate to it any functions, other than the power of levying a rate or borrowing money, which are exercisable by it within the contributory place (*q*).

Instead, however, of appointing a parochial committee, a rural district council may delegate to a parish council the powers which it could confer upon a parochial committee, and the parish council in discharging those powers acts as the agent of the rural district council (*r*).

Joint Committees.—Another useful device for increasing efficiency in local administration is the use of joint committees, appointed by two or more local authorities, for regulating matters of common interest to the appointing authorities. Here again the Local Government Act, 1933, generalised provisions formerly applying only to certain classes of authorities. Formerly county councils might appoint joint committees with any other interested county or county borough council or quarter sessions (*s*), and district and parish councils might set up joint committees for the conduct of matters of common interest (*t*).

Now any local authority may concur with any one or more other local authorities in appointing a joint committee, for

(*q*) Local Government Act, 1933, § 87.

(*s*) Local Government Act, 1888, § 81.

(*t*) Local Government Act, 1894, § 57.

(*r*) *Ibid.*, § 88.

any purpose in which the appointing authorities are jointly interested, other than a purpose for which they are expressly required or empowered by statute to appoint a joint committee. Under this general power only members of the constituent authorities may be appointed to a joint committee, except in cases where a particular enactment requires or empowers the authorities in question to appoint committees (as opposed to joint committees) and lays down provisions governing the composition of those committees. In this latter case, if two or more authorities concur in appointing a joint committee, the special statutory provisions which would have regulated the composition of their own committees, had they not appointed the joint committee, apply to determine how that joint committee shall be composed. For instance, § 201 of the Public Health Act, 1936, requires an authority to which it applies to appoint a maternity and child welfare committee of which two members at least shall be women. If two or more such authorities appoint a joint committee for this purpose, this provision will apply to govern its composition (*u*). The constituent authorities concurring in appointing a joint committee may delegate to it any of their functions, except the power of levying a rate, or of borrowing money.

Many Acts dealing with particular local government services have embodied the idea of joint committees and either require or authorise their appointment, at the same time providing express rules for governing their composition. The standing joint committee, which is the county police authority, affords an illustration. It is a compulsory statutory committee and is composed of members appointed in equal numbers by the county council and the county quarter sessions (*v*).

The use of joint committees gives a great degree of flexibility to local government, enabling services to be administered in areas most fitted to produce efficiency. Thus it enables the advantages, which the employment of *ad hoc*

(*u*) Local Government Act, 1933, § 91.

(*v*) Local Government Act, 1888, § 30. See also, *e.g.*, Town and Country Planning Act, 1932, §§ 3 and 4, and Town and Country Planning (Interim Development) Act, 1943, § 9.

authorities offers, to be obtained without any sacrifice of the convenience and symmetry which the maintenance of a uniform system of general local authorities secures. In consequence the adoption of this device has been frequent in recent legislation.

Joint Boards.—The idea embodied in the creation of joint committees has indeed been found so convenient that in some cases it has been carried further by the creation of what may be called “joint boards.” Joint boards, like joint committees, are bodies composed of the nominees of two or more authorities appointed to deal with some service in which the appointing authorities are mutually interested, but they differ from joint committees in several respects. In the first place, joint boards are entities altogether separate and distinct from the authorities which appoint their members. They are almost invariably bodies corporate with a perpetual existence which does not permit of their dissolution merely by the withdrawal of one of the appointing authorities from further participation in the scheme they control. Their powers and duties are in consequence determined once and for all at their creation, and cannot be revoked or altered merely at the wishes of one or more of the appointing authorities. Joint committees, on the other hand, are merely temporary creations dependent, both for their continued existence and for the powers which they may exercise, upon the extent to which the appointing bodies are prepared from time to time to make use of them. They are not separate entities with powers of their own, but derive their legal position entirely by way of delegation from the authorities appointing them. The results of this distinction are clearly shown by the arrangements for financing joint committees and joint boards respectively. Joint committees have no financial powers of their own; they are only able to obtain such moneys as the appointing authorities are prepared from time to time to give them (*w*). Joint boards, on the other hand, are their own financial masters and obtain the moneys

(*w*) See Local Government Act, 1933, §§ 91 and 93.

they need by issuing peremptory precepts (x) on the authorities which appoint their members.

Joint boards have been utilised frequently for the management of permanent services in which several authorities are interested, while joint committees are often used for more temporary concerns. Joint boards have been set up by local Acts, as for instance the Derwent Valley Water Board, but there are in general statutes certain provisions under which joint boards may be constituted. Thus the Minister of Health may by order (y) form a joint board consisting of representative members of two or more public health authorities as a "port health authority" (z). Similarly the Minister of Health may by order (a) create a joint board to govern two or more districts united for any public health purposes (b). Again, a planning scheme may make provision for the constitution of a joint body as the authority for enforcing the scheme (c). Indeed, in one case at any rate, the idea has been utilised to obtain some degree of co-ordination of the activities of local authorities and private enterprise engaged in similar undertakings, for the Electricity Commissioners are empowered, by schemes confirmed by the Minister of Transport and Parliament, to set up "joint electricity authorities" representative of both local authorities and companies authorised to supply electricity (d). Nomenclature is not, however, always correctly applied, and there are cases where bodies separately incorporated are spoken of in statutes as "joint committees" when

(x) See below, p. 164.

(y) Provisional, in case of opposition.

(z) Public Health Act, 1936, §§ 2-5, 9 and 10.

(a) Provisional, in case of opposition.

(b) Public Health Act, 1936, § 6. He may, with the consent of the authorities concerned, by order constitute a joint board representative of county and county borough councils for the discharge of any of their functions under the Public Health Act, 1936: *ibid.*, § 8. This power has been extended by the Water Act, 1945, § 8, to enable him to constitute a joint board for discharging functions relative to water supply without the consent of the authorities concerned.

(c) Town and Country Planning Act, 1932, § 11. See also the Education Act, 1944, 1st Schd., Part I, which enables the Minister of Education to establish joint education boards.

(d) Electricity (Supply) Act, 1919, §§ 6, 7 and 39; Electricity (Supply) Act, 1926, § 36.

they would more properly be described as "joint boards." Under the Poor Law Act, 1930, for instance, "joint committees" may be created and incorporated (*e*).

Divisional Executives.—The Education Act, 1944, has gone even further by requiring local education authorities for counties, unless the Minister of Education otherwise directs, to make schemes of divisional administration and to constitute bodies of persons known as divisional executives for exercising certain of the authority's educational functions (*f*). Normally the scheme must be made by the county council after consultation with the county district councils in its area, but certain borough and urban district councils were enabled to claim, before October 1, 1944, to be excepted from the county scheme. In such cases the borough and urban district council was authorised to make its own scheme of divisional administration, after consultation with the county council. In either event, the approval of the Minister of Education is required to such schemes and a scheme does not take effect until approved by an order made by him.

Control of Committees by Council.—The varying powers to appoint committees which are possessed by local authorities form the legal basis of the committee system by which the business of local government is carried on, but it would be a false impression to imagine that the work of councils is limited to the appointment of numerous committees, and the approval or assent to their acts coupled with the narrow task of finance. In fact a system of control exists, by which the council is enabled to act as a unifying force and to deal with all questions of policy or principle. This control is exercised in various ways. Obviously in the case of committees, all of whose acts require the express approval of the council, the control is real

(*e*) Poor Law Act, 1930, § 3. The "joint hospital committees" which could be set up and incorporated under the Isolation Hospitals Acts, 1893 and 1901, are, under the Public Health Act, 1936, § 315, to be replaced by joint boards.

(*f*) Education Act, 1944, 1st Schd., Part III.

enough. In other cases where the committees exercise executive powers, the council's control is necessarily indirect. In such cases the council must at least receive reports from its committees of their activities, and may by criticism and, if necessary and when occasion offers, by the alteration in the *personnel* of the committee, sharply express its disapproval. A more stringent control, however, exists through the medium of finance. Councils usually by their standing orders require each committee to prepare estimates of its expenditure for the ensuing financial year, to submit them to the finance committee, and to obtain their approval by the council. Similarly at the end of the financial year the committees' accounts must be audited, and a report made to the council. In these ways the council can by withholding supply effectively control the activities of its committees. Again, in the case of committees to which the council is empowered to delegate executive functions, it must be remembered that the delegation itself and its extent, as well as any conditions subject to which it may be made, are in the control of the appointing council, often exercised through the provisions it inserts in its standing orders (g).

Thus, whether executive functions have or have not been delegated to its committees, the council retains a sufficient control over their activities to enable it to be the directing body of the whole of the local administration carried on in its area. In general it takes care to retain for itself the sole effective power to make decisions involving questions of importance or principle so that the work of administration may be harmoniously carried on. Its committees deal with the details of administration ; they discuss and decide practical questions arising out of everyday practice, often on the report or advice of the officer concerned. Moreover the committees supervise the routine of the particular departments in much the same general way as that in which a Minister of the Crown supervises

(g) Statutory committees, to which the council must delegate its powers, or which alone possess the powers, are not, of course, subjected to this form of control.

the work of his Department. But the local government committee differs from the Minister in that almost every decision, even of detail, must be referred to it. The Minister may decide questions of general policy ; the committee decides the details of how the policy shall actually be carried out, often, it must be admitted, by merely adopting the suggestion of the competent expert officer at the head of the department concerned.

The Council and the Electorate.—The committee system enables the elected members of a local authority to do all the work of administration, except the bare routine, by the sub-division of labour which it makes possible, without requiring the members of each committee to assume political responsibility before the council for their actions. At the same time, as the direction of policy and the decision of all questions of importance are kept under the immediate control of the council itself, the dangers of lack of co-ordination can be avoided. Through the wide use of committees the work of the council itself tends to assume a deliberative nature, and in some ways may appear to resemble the actions of Parliament. But unlike Parliament the council of a local authority is not a legislative body. It can make no new law, with the quasi-exceptions of its standing orders and bye-laws (*h*). Its activities are strictly confined to the sphere of administration, in which alone it makes or approves decisions. It might, in consequence, be thought that the employment of representative elected bodies was based upon some confusion of the work of local authorities with that of Parliament. This is not, however, the case. Parliament is not solely a legislative body : the existence of the Cabinet system implies at once that Parliament, at least indirectly, controls the work of Executive Government, and a large part of its time is in fact taken up with the criticism or approval of acts of administrative policy. The council of a local authority in the same way may be regarded as a miniature House of Commons shorn of its legislative powers. Democracy,

(*h*) See below, Ch. VIII.

to be more than a name, involves not only the consent of the governed to the making or altering of law, but also their power of controlling administration, which in many cases more closely touches their everyday lives. The business of administration is not confined to the automatic and routine application of rigid sets of rules, involving the exercise of no discretion. Decisions have to be made, though they may be limited by the law and confined in their scope. In particular in the sphere of local government the inhabitants of an area may be vitally affected by the activities or omissions of their local authority, at least in respect of the financial burdens which they will be compelled to bear or of the amenities which they will have to enjoy. Hence it is no mistaken doctrine which prescribes that the members of a modern local authority should be elected.

CHAPTER VI

LOCAL GOVERNMENT FINANCE

Importance of Local Government Finance.—As we have already seen, any adequate definition of local government in England must take account of the fact that local authorities have powers to impose local taxes upon the inhabitants of the areas subject to their control (a). Local politics frequently centre round the question of expenditure and the consequential increase or decrease in the rates. These considerations serve to show the great importance which finance assumes in local government and to justify its discussion in this place.

Income of Local Authorities: I. Income from Property.—The income of local authorities, which serves to finance the work of administration carried on by them, is drawn from three sources: property, rates and Government grants (b). The first source can be dismissed briefly. In addition to various fees and tolls authorised to be collected in connection with certain services, some of the older boroughs are the owners of land and buildings producing a considerable revenue, but this is a comparatively rare state of affairs (c). Income from property is more often

(a) See above, p. 7.

(b) The income of all local authorities in England and Wales on revenue account for the year 1934-5 was

Rates	£162,949,889
Government Grants	£135,164,029
Other Income	£188,608,466
Total	£486,722,384

(c) See Local Government Act, 1933, §§ 171 and 172, as to the powers of boroughs to acquire and manage and dispose of corporate land with the consent of the Minister of Health, below, p. 236.

derived from modern trading undertakings maintained by local authorities, such as markets, tramways, omnibuses, electricity, gas and water undertakings. Legally, save in exceptional cases, the profits accruing from these municipal businesses are available towards the cost of maintaining the general, unremunerative services performed by the local authorities in question : they may be used "in relief of the rates." In practice, however, many people contend that the profits should not be used in this way, but should in fairness be "put back into the business" in order to reduce the cost of the trading service to the actual consumer.

This latter principle has triumphed to a limited extent in the case of electricity undertakings maintained by local authorities. The Electricity (Supply) Act, 1926 (*d*), permits a local authority to apply any net surplus produced in any year by its electricity undertaking either in reducing charges to consumers, or for capital purposes, or "in aid of the local rate." But the last alternative is closely limited by conditions. No payment in aid of the rates may be made unless the reserve fund of the electricity undertaking is equal to one-twentieth of the aggregate capital expenditure of the undertaking, and even then the amount applied in aid of the rates must not exceed one and a half per cent. of the outstanding debt of the electricity undertaking (*e*).

2. Rates.—A more important head of income is found in the rates, which require much more detailed consideration than need be bestowed upon revenue from property. Rates became of importance in local government with the passing of the Poor Relief Act of 1601, which introduced for the relief of

(*d*) § 43 and 5th Schd.

(*e*) The Local Government Act, 1933, § 194, preserves the existing position as regards the disposal of surplus revenue arising from any undertaking carried on by a local authority. The Housing Act, 1936, § 130, provides for any surplus in a local authority's Housing Revenue Account to be credited at five-yearly intervals to the Minister of Health and the local authority's general rate fund in proportion to the contributions made by each respectively. But here the matter is complicated by the payment of grants in aid by the Minister.

destitution the parochial poor rate, based upon the analogy of the already existing church rates. The effect of this Act was to make rating a parochial matter, and the precedent created by it was followed when other powers to make rates were subsequently conferred. The intention of the Act of 1601 was to impose a local tax on the wealth of inhabitants in the parish. It was to be assessed in accordance with the individual's visible means in land or goods. In time, however, it became obvious that any attempt to assess the value of chattels must fail, and rates became limited to a tax upon the occupiers of real property (*f*). Following the principle of the Elizabethan poor law, rates were in general assessed and collected by parishes through the medium of the overseers of the poor, who in modern times had become nothing but rating officers, having lost all their poor law powers. Thus even the county rate, though made by the county authority, had to be levied parochially in accordance with the parochial poor rate assessments.

A great reform of the law of rating has been undertaken in recent years by the Rating and Valuation Act, 1925, and the Local Government Act, 1929. These Acts have fundamentally altered rating areas, and form the last stage in the long process of simplifying and unifying the rates imposed by local authorities.

Rating Authorities.—The basis of the present scheme is the “rating authority” acting in a “rating area” which replaces the older and smaller poor law parish. The rating authorities are simply the councils of county boroughs, boroughs, and urban and rural districts, and the rating areas are likewise the areas administered by these authorities, which together, of course, cover the whole country (*g*). The duties of rating authorities are concerned with the making and levying of rates and with the valuation of real property, as are explained below in more detail.

(*f*) See E. Cannan, *History of Local Rates in England*.

(*g*) Rating and Valuation Act, 1925, § 1.

Rates are local taxes upon the occupation of real property (*h*), and they are made and levied in the form of a certain sum of money in the pound of the "rateable value" of each hereditament in the rating area. For example, a rating authority requiring £10,000 makes a rate of, say, "six shillings and eightpence in the pound," because it knows that the aggregate of the rateable value of all the real property in its area amounts to £30,000, and that this rate will therefore produce the £10,000 which it needs, and at the same time define the respective proportions of that sum which each occupier will be called upon to provide. Hence the first thing we must consider is the way in which rateable value is determined, or, in other words, assessment.

Assessment.—The unit for the purpose of assessment is the "hereditament," which may be defined as each parcel of land, buildings, sporting rights, etc. (*i*), separately occupied (*j*). Occupation is the basis of the liability to pay rates and in rating law this term has a peculiar meaning. It has been said that

"Occupation . . . is not synonymous with legal possession: the owner of an empty house has the legal possession, but he is not in rateable occupation. Rateable occupation, however, must include actual possession, and it must have some degree of permanence: a mere temporary holding of land will not constitute rateable occupation. Where there is no rival claimant to the occupancy, no difficulty can arise; but in certain cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every such case must be one of fact—namely, whose position in

(*h*) In contrast to income tax, a rate has been defined as a tax upon "the occupation of hereditaments, irrespective of a person's income generally, and irrespective of whether the ratepayer is in fact deriving profits or gains from such occupation": *Re A Reference under the Government of Ireland Act, 1920* [1936] A.C. 352; [1936] 2 All E.R. 111; Digest Supp.

(*i*) The definition in the Rating and Valuation Act, 1925, § 68, runs: "any lands, tenements, hereditaments or property which are or which may become liable to any rate in respect of which the valuation list is by this Act made conclusive"—a singularly circular definition, since by § 20 the valuation list is made conclusive in respect of the "several hereditaments" included in it!

(*j*) *North Eastern Railway Co. v. York Union* [1900] 1 Q.B. 733; 38 Digest 453, 193.

relation to occupation is paramount, and whose position in relation to occupation is subordinate ” (k).

Thus a mere lodger is not in rateable occupation, but the tenant of a flat is, in general, rateable in respect of his occupation so that the flat forms a separate hereditament for rating purposes.

The basis of assessment is the rent which a tenant, holding the hereditament on a tenancy from year to year, might reasonably be expected to pay, on the conditions that the landlord paid the cost of repairs and insurance and the tenant paid tenants' rates and taxes. Obviously this basis of the hypothetical tenant from year to year may be difficult to apply, and different methods have to be employed for the purpose of obtaining a uniform standard of assessment for different types of hereditament (l).

The hypothetical tenant could only of course be expected to pay a rent when his occupation would be beneficial. But beneficial occupation is not limited to an occupation from which profit is derived, and therefore public bodies occupying premises which enable them to perform their statutory duties are properly rateable in respect of the benefit they derive, although the upkeep of the premises is expensive to them and is not offset by any pecuniary advantage derived from their use (m). Moreover in assessing such premises the public body owning and occupying them is not excluded from consideration as the hypothetical tenant, and the rent which it might reasonably be expected to pay for the premises in order to enable it

(k) *Westminster Corporation v. Southern Railway Co.* [1936] A.C. 511, p. 529; [1936] 2 All E. R. 322; Digest Supp. There is, for instance, no rateable occupation of unfurnished dwelling-houses intended to be used as offices in case of damage by enemy action: *Associated Cinema Properties, Ltd. v. Hampstead Borough Council* [1944] K.B. 49; [1943] 2 All E.R. 696, D.C.

(l) See, e.g., *Kingston Union v. Metropolitan Water Board* [1926] A.C. 331; 38 Digest 547, 901. In the case of railways which, because their property stretches through the areas of many authorities, are difficult to assess piecemeal, the Railways (Valuation for Rating) Act, 1930, has set up a central authority to value each railway system as a whole and to apportion the total net annual value so obtained among the different railway hereditaments situated in each area. See *Railway Assessment Authority v. Southern Railway Co.* [1936] A.C. 266; [1936] 1 All E.R. 26; Digest Supp.

(m) *London County Council v. Erith Parish & Dartford Union Assessment Committee* [1893] A.C. 562; 38 Digest 429, 42, relating to outfall sewers.

to perform its statutory duties may be taken into consideration (*n*). Again in this respect the fact that the hypothetical tenant is assumed to be holding on a tenancy from year to year becomes important. For instance, the mere fact that a mine has earned no profit in a particular year does not of itself mean that it has no value for rating purposes. Though strictly only entitled to hold the premises for one year, a tenant from year to year may usually expect a longer occupation, and therefore, in order to obtain enjoyment of the property in later years, may reasonably be willing to pay a rent for the year in question (*o*).

Rateable Value.—The value so obtained from consideration of the probable rent the hereditament would command on the usual condition of the landlord undertaking liability for repairs and insurance, is the basis of the assessment of each hereditament. But rates are levied not on the owner, but on the occupier. To find the measure of the latter's liability, therefore, there must in the case of certain classes of hereditaments (for instance, dwelling-houses and land) be deducted from this value, called in these cases "the gross value," the cost of repairs and insurance. This was formerly a matter of estimation, but now in these cases certain specified deductions are made to reach the "net annual value," which in such cases is the "rateable value" (*p*). In other cases, where

(*n*) *Davies v. Seisdon Union* [1908] A.C. 315; 38 Digest 523, 718.

(*o*) *Consett Iron Co. v. Durham County Assessment Committee for No. 5 or North-Western Area* [1931] A.C. 396; Digest Supp.

(*p*) Rating and Valuation Act, 1925, § 22 and 2nd Schd., Part I. In the case of certain special types of hereditament (such as land covered with water, canals and railways) situate in urban rating areas certain deductions have to be made even from the net annual value in order to reach the rateable value: Rating and Valuation Act, 1925, § 22 and 2nd Schd., Part II. The reason for this further complication lies in the fact that before the changes effected by the Act of 1925 there were in urban areas in effect two sorts of rates, the poor rate charged on the net annual value of all hereditaments without any deduction, and the general district rate of the Public Health Act, 1875, from which some relief was granted in respect of these peculiar forms of property. Under the scheme introduced by the Act of 1925 there is only one rate, and the older relief from the general district rate has been preserved in urban areas by way of a deduction from the net annual value at a percentage which allows for the fact that in future this indirect relief will affect the one comprehensive rate, and not only one out of several rates. In rural rating areas the "special rate" is still levied in such a way as to preserve the old relief directly, and accordingly in such areas no deduction is made from the net annual value. Compare below, p. 167.

deductions for repairs and insurance have not to be made, the value based on the hypothetical rent is itself the "net annual value" and is also taken as the rateable value.

De-rating.—But this matter of ascertaining the rateable value is further complicated by the de-rating provisions contained in the Rating and Valuation (Apportionment) Act, 1928, and §§ 67 and 68 of the Local Government Act, 1929.

These modifications in the general scheme of assessment are designed to relieve agriculture and industry from the burden of rates, and are a recognition that the restriction of the obligation to pay rates to the occupiers of land is not wholly satisfactory. To the agriculturist the land is at once his raw material and the tools of his trade, and yet he alone was required to pay rates on matters so vital to his business. The rates falling on industrial premises were also regarded as forming an unfair burden on industry for which no commensurate services were directly received. Hence, in a desire to remove to some extent the reproach that in these cases rates formed a direct tax on business, the de-rating provisions were enacted.

These provisions deal with three classes of hereditaments and relieve them in varying degrees from the burden of rates, by requiring them to be dealt with in a peculiar way in order to find their rateable value. Agricultural land and buildings, other than dwelling-houses, are totally relieved from rates by the provision that they shall be deemed to have no rateable value, so that they do not appear at all in the valuation lists. Industrial hereditaments, which include mines, factories and workshops (*q*), are relieved of three-quarters of the rates they would normally pay, by the provision that their rateable value is to be entered as one-quarter of their net annual value. Thirdly, "freight-transport hereditaments," which include railways, canals and docks, are similarly given a rateable value amount-

(*q*) There has been a vast mass of litigation as to the precise meaning of this term as defined in the Act of 1928: see, e.g., *Moon v. London County Council* [1931] A.C. 151; *Digest Supp.*; *Sedgwick v. Camberwell Assessment Committee & Watney, Combe, Reid & Co.* [1931] A.C. 447; *Digest Supp.*

ing to only one-quarter of their net annual value, but in this latter case the benefit derived from their being relieved of three-quarters of their rates is not allowed to rest where it falls, for there are provisions for passing on the relief to the commercial users of the undertaking by the reduction of freight charges.

Valuation List.—From the above explanation of the principles of assessment for rates, it will be seen that from the basis of the rent, which a hypothetical yearly tenant might reasonably be expected to pay for the hereditament, there has to be constructed a rateable value upon which rates can be levied. To translate these principles into their practical application, the rating authority has to prepare a valuation list, containing the rateable value of every rateable hereditament situate in its area. As values cannot be expected to remain constant, it is provided that quinquennial revaluations shall be made (*r*).

To assist in preparing a new valuation list each rating authority serves notices upon occupiers or owners of hereditaments in its area requiring them to make certain returns (*s*), with the aid of which and by examination of the premises the authority makes a “draft valuation list.” Public notice of the making of this draft list must be given, so that persons affected may inspect it, and any person considering himself aggrieved by any incorrectness or unfairness in it may object (*t*).

Assessment Committee.—It is obvious that, as the rateable value will form the basis upon which rates will be levied

(*r*) Rating and Valuation Act, 1925, § 19. By the Rating and Valuation (Postponement of Valuations) Act, 1938, the quinquennial revaluations which should have commenced in 1938 were postponed till 1941, in order that time might be found for an investigation into complaints that valuation of post-War dwelling-houses under the existing law was pressing unfairly on owner-occupiers. The outbreak of war rendered a further postponement necessary and, in consequence, the Rating and Valuation (Postponement of Valuations) Act, 1940, further postponed the third valuation to a date to be appointed, after the end of the war.

(*s*) Rating and Valuation Act, 1925, § 40, as amended by the Rating and Valuation (No. 2) Act, 1932.

(*t*) Rating and Valuation Act, 1925, §§ 25 and 26.

upon him, the individual occupier should have an opportunity of questioning it. Also it is extremely important that uniformity in the assessments made should be secured throughout the whole rating area. These two safeguards are sought to be secured by means of "assessment committees."

Under the Rating and Valuation Act, 1925 (*u*), these assessment committees act for separate "assessment areas," which are determined in two ways. The area of each county borough forms a separate assessment area, and in the administrative county assessment areas, each containing one or more rating areas, are set up by schemes prepared by the county council and confirmed by the Minister of Health. In a county borough the assessment committee is appointed by the county borough council, but not less than one-third of the members must be persons who are not members of that council. In other assessment areas the scheme which determines the limits of the area, provides for the appointment of the assessment committee by the county and district councils concerned, though the committee need not be confined to members of the appointing councils (*v*).

The work of the assessment committee is broadly to see fair play, on the one hand between the rating authority and the individual occupier, and on the other hand between the occupiers *inter se* (*w*). Consequently the members of the committee are, as it were, themselves representative ratepayers who act as a quasi-judicial tribunal in hearing the disputes brought before them.

Objections.—The main business of the assessment committee is to approve the draft valuation list prepared by the rating authority. Any person aggrieved on the ground of the incorrectness or unfairness of anything in the draft list may

(*u*) § 16.

(*v*) Rating and Valuation Act, 1925, § 17; Local Government Act, 1929, § 15.

(*w*) For instance, the fact that someone else has been under-assessed does not entitle one also to be under-assessed; the remedy is to see that the other person's assessment is raised to its proper level: *Ladies' Hosiery and Underwear Ltd. v. West Middlesex Assessment Committee* [1932] 2 K.B. 679; Digest Supp.

“object” in a prescribed manner (*x*), and thereupon his objection is considered by the assessment committee. The objector and the representative of the rating authority are entitled to attend before the committee and be heard in support of their respective contentions (*y*). When the committee has dealt with the objections made before it, and, if necessary, made any other alterations it sees fit in the draft list, it approves it, and the approved list thereupon becomes the valuation list in force for the rating area, upon which rates may then be made and levied (*z*).

Proposals.—Almost identical with the hearing of objections is the duty of the assessment committee in connection with “proposals.” Objections, as we have seen, are made to the draft valuation list before it is approved by the committee: proposals, on the other hand, may be made after the draft list has by approval become the substantive valuation list. The rating authority or any person entitled to object to a draft list may make proposals to amend the valuation list in force (*a*); for instance, on an alteration of premises raising their value the rating authority may “propose” to amend the list by the insertion of an increased gross and rateable value in respect of that hereditament (*b*). Proposals come before the assessment committee and are heard in the same way as are objections. If the committee accedes to the proposal it amends the valuation list accordingly.

The assessment committee in the hearing of objections and proposals acts as if it were a court, and this judicial appearance is heightened by the fact that from its decisions an appeal lies to quarter sessions, and thence by case stated to the High

(*x*) Rating and Valuation Act, 1925, § 26.

(*y*) *Ibid.*, § 27.

(*z*) *Ibid.*, § 28.

(*a*) *Ibid.*, § 37.

(*b*) The fact that the Rating and Valuation Act, 1925, § 19, provides for revaluations at intervals of five years and so impliedly prohibits revaluations in the period intervening between two quinquennial revaluations does not prevent the rating authority from making proposals to amend the list even when such proposals are designed to correct an erroneous basis of assessment applied to a whole class of hereditaments: *R. v. Horsham and Worthington Assessment Committee, Ex parte Burgess* [1937] 2 K.B. 408; [1937] 2 All E.R. 681; Digest Supp. But it is improper to make use of this provision to seek to make what is virtually a new valuation list: *Pratt v. North West Norfolk Assessment Committee & Norfolk County Valuation Committee* [1945] 2 All E.R. 78; 114 L.J.Ch. 321.

Court (c). Moreover it is bound to perform its duties in a judicial spirit (d). But all the same legally an assessment committee is not a court exercising judicial functions in the strict sense (e), and this is seen to be the true position when consideration is given to other rules regulating its activities. Thus it has no power to compel the attendance of witnesses or to administer an oath ; it may, if it thinks that course desirable in any particular case, employ an independent valuer to value the premises in dispute (f). Its administrative nature, however, appears most clearly when an appeal to quarter sessions is made from any of its decisions. In such a case the assessment committee is itself made a respondent to the appeal, and may if it thinks fit appear, in its character of a body representative of the general mass of ratepayers, and contest the appeal ; and moreover it may be made liable to pay costs (g). Thus, though it has some duties of a quasi-judicial nature to perform, the assessment committee is in reality an administrative body set up in the interests of uniformity, as an institution independent of the rating authority.

County Valuation Committee.—The desire to secure uniformity in assessment has not stopped at the creation of assessment committees. The assessment areas, which determine the territorial limits of these committees' jurisdiction, are comparatively small, and machinery was introduced by the Rating and Valuation Act of 1925 to link up the assessment areas and to ensure over wider fields uniformity in the principles of assessment and in their application. Two institutions perform these duties. The county council draws its income derived from rates from the whole of the administrative county, which

(c) Rating and Valuation Act, 1925, § 31.

(d) Prohibition will lie to an assessment committee : *R. v. North Worcestershire Assessment Committee, Ex parte Hadley* [1929] 2 K.B. 397 ; Digest Supp. ; *R. v. North-East Surrey Assessment Committee* [1933] 1 K.B. 776 ; Digest Supp.

(e) *R. v. Assessment Committee of St. Mary Abbots, Kensington* [1891] 1 Q.B. 378 ; 38 Digest 582, 1159 ; *Veasey v. Beardsley & Son, Ltd.* (1924) 23 L.G.R. 118 ; 38 Digest 583, 1164.

(f) Rating and Valuation Act, 1925, § 38.

(g) *Ibid.*, §§ 31 and 32.

may well be divided into several separate assessment areas and many separate rating areas. In the interests of the ratepayers of these areas it is important that uniformity of assessment should be obtained, so that each may contribute fairly to the cost of the services administered by the county council. Accordingly in each administrative county the county council appoints a county valuation committee, consisting of members of the county council and additional members, one of whom is nominated by each assessment committee in the county (*h*). In order to promote uniformity in the principles and practice of valuation these county valuation committees may hold conferences, make recommendations, etc. They are entitled to insist on the attendance of their officers at meetings of assessment committees in the county (*i*), though the quasi-judicial functions of these latter bodies make it improper for the officers of the county valuation committee to remain after the parties to an objection or proposal have retired in order that the assessment committee may come to a decision on their case (*j*). As, especially in rural rating areas, the bulk of the money raised by the rating authority is levied on behalf of the county council, it is inevitable that the county valuation committee should exercise great influence over the activities of the rating authorities in the administrative county in the matter of assessment. The county council can afford to put an expert technical staff at the disposal of the county valuation committee, and the rating authorities are in general glad to avail themselves of its services. Thus the county valuation committee may appoint valuers to value special classes of property throughout the county (*k*), and it can ensure that its views are not overlooked because it may appear as a party to proceedings before assessment committees or on

(*h*) Rating and Valuation Act, 1925, § 18.

(*i*) *Middlesex County Valuation Committee v. West Middlesex Assessment Committee* [1937] Ch. 361; [1937] 1 All E.R. 403; Digest Supp.

(*j*) *R. v. North-East Surrey Assessment Committee* [1933] 1 K.B. 776; Digest Supp.

(*k*) *Coulsdon and Purley Urban District Council v. Surrey County Council* [1934] Ch. 694; Digest Supp.

appeals therefrom, and is even entitled, as a party "aggrieved," to make objections to the draft valuation list, or proposals for the amendment of the substantive valuation list (*l*).

Central Valuation Committee.—For the whole country uniformity is desirable, if only because one factor, upon which general exchequer grants are made payable, takes into account the rateable values of different authorities, and so the Act of 1925 (*m*) requires the setting up of a Central Valuation Committee. Its composition is determined by a scheme made by the Minister of Health, so as to include members of rating authorities, county valuation committees and assessment committees, as well as other persons. The general duty of the Central Valuation Committee is, like that of the county valuation committees, to secure uniformity in valuation, but, unlike the county committees, it has no executive functions. Apart from the power to hold conferences, etc., its duties are limited to acting in an advisory capacity to the Minister.

Making and Levying of Rates.—We have now considered the law of assessment, and we have seen both the principles to be applied and the machinery for their application and control in the interests of uniformity. We may now suppose that the substantive valuation list is made and in force, and pass to a discussion of the use which is made of it as a basis for rating, or in other words, to the making and levying of rates. In this respect the great principle secured by the Rating and Valuation Act of 1925 is that the rating authorities—the councils of county boroughs, boroughs, urban districts and rural districts—alone have power to make and levy rates in their respective areas (*n*), and, as these areas together cover the whole country no other local authority has any powers of rating (*o*).

(*l*) Rating and Valuation Act, 1925, §§ 26 and 37.

(*m*) *Ibid.*, § 57. As to general exchequer grants see below, p. 181.

(*n*) Local Government Act, 1933, §§ 186, 189 and 192.

(*o*) The rather exceptional position of land drainage authorities must, however, be remembered in qualification of this statement; but the principles upon which they levy rates upon lands benefited by their works are different. See below, Ch. XXIV

Precepting Authorities.—But these rating authorities are not the only authorities interested in raising money to meet their expenditure out of rates ; for instance, the county councils annually require income which can only be produced from the rates. The authorities which have no rating powers are called “precepting authorities,” and must rely upon the rating authorities to obtain for them the money which they need (*p*). The prescribed procedure is for the precepting authorities to calculate the amount of money which they require, and to send a “precept”—which is in effect a demand note specifying the amount required—to the appropriate rating authorities, who raise the money by making the necessary rates. The precept issued by a county council must specify the area liable to contribute, and the amount required must not be stated in the form of a lump sum but of an amount in the pound of rateable value. To enable the precepting authorities to calculate how much in the pound they will have to precept for so as to obtain the lump sums they require, the rating authorities are required to send to them particulars of the sum which will be produced in their respective rating areas by a penny rate (*q*). The purpose of this technicality, requiring the precept to be in the form of a demand for an amount in the pound, is to secure uniformity in the rate made on behalf of the precepting authority over the whole area tapped by it, which may extend over several rating areas. For instance, the county council draws its revenue from rates levied all over the administrative county, and these provisions ensure that every area in the county pays its full share on a uniform basis. If a county council requires, for example, the proceeds of a five-shilling rate over its whole area, it issues precepts for that amount to the council of every non-county borough, urban and

(*p*) Local Government Act, 1933, §§ 183 (county councils) and 193 (parish councils and parish meetings).

(*q*) Rating and Valuation Act, 1925, § 9 ; amended by the Local Government Act, 1933, 11th Schd. and the Local Government (Financial Provisions) Act, 1937, § 9 and 2nd Schd. In the case of other precepting authorities, *e.g.* assessment committees, precepts take the form of demands for lump sums, but schemes may be made for applying to them the provisions governing county council precepts.

rural district within the county. Those rating authorities, when they come to make their rates, each include five shillings in the pound to satisfy the county council's precepts, so that all the ratepayers in the county contribute to general county expenses at a uniform rate. On the other hand, a county council is not in all cases entitled to charge the whole of the administrative county with every item of its expenditure : some parts of the county may be exempt by law from contributing towards certain expenses incurred by the county council from which they derive no benefit (*r*). Consequently county expenditure is divided into two classes : expenses for " general county purposes " to which the whole county is liable to contribute, and expenses for " special county purposes " which can be charged only on part of the county (*s*). Because of this distinction county councils must keep separate accounts for expenditure falling under these two heads (*t*), and, in issuing their precepts to the rating authorities in the administrative county, they must take steps to secure that the rate to be levied in respect of special county purposes, shall fall only on that part of the county which is chargeable (*u*).

County councils must (*v*), and other local authorities usually do, require the submission of estimates to their finance committees, which recommend to the council the rate or precept which should be made ; but the final control over finance remains with the council, which must approve its finance committee's recommendations before they can acquire legal force. When this process has been completed in the various councils concerned, and the rating authority has received the precepts made upon it by other authorities for which it is required to act, it must proceed to make a sufficient rate to cover both its own expenditure and the amounts it will have to hand over

(*r*) *E.g.* maternity and child welfare : Public Health Act, 1936, § 202.

(*s*) Local Government Act, 1933, § 180. (*t*) *Ibid.*, § 181.

(*u*) *Ibid.*, § 183. So, too, county councillors representing areas not chargeable with expenditure in respect of any matter may not vote thereon : Local Government Act, 1933, § 75 ; and this prohibition extends to meetings of committees and sub-committees : *Alderton v. Essex County Council* [1937] Ch. 541 ; [1937] 3 All E.R. 219 ; Digest Supp.

(*v*) Local Government Act, 1933, §§ 86 and 182.

to the precepting authorities who have made calls upon it (*w*). In order to secure publicity the making of a rate by a rating authority must be published in the prescribed manner (*x*).

Uniformity of Rate.—The principle underlying those parts of the reforms in rating law introduced by the Act of 1925, which deal with the making and levying of rates with all the attendant details about precepts, is that there shall in no rating area be more than one rate made, and that the amount of the rate levied in respect of each interested authority, whether a rating or a precepting authority, shall as far as possible be uniform throughout the area from which it draws its revenue. In order to conform with the requirements of this principle the rating authorities can alone make and levy rates, and the rates they make must satisfy both their own needs and the precepts made upon them by other authorities. When the rate has been collected the rating authority must pay over to the precepting authorities the amounts necessary to satisfy their precepts (*y*).

The General Rate.—This provision, which limits the making and levying of rates to rating authorities, prevents the ratepayer of any area from being subject to more than one rate, but complete uniformity even over the whole of each rating area in the amount of the rate levied cannot be achieved because some particular expenses may only be incurred for the benefit of particular parts of the area. Hence provision has to be made for dealing with these extra expenses which do not fall evenly over the whole area of the rating authority. In both urban and rural rating areas the Act requires the rating authority to make and levy a "general rate" to cover the expenditure both of the rating and precepting authorities concerned, which falls evenly over the whole of the area, and this will be at a uniform rate in the pound. If necessary any expenditure

(*w*) Rating and Valuation Act, 1925, § 12.

(*x*) *Ibid.*, § 6.

(*y*) Provisions for compelling rating authorities to perform their duties towards precepting authorities are contained in the Rating and Valuation Act, 1925, § 13.

falling only upon a particular part of the rating area (*z*) must be collected at the same time from the ratepayers of the part concerned, under the name of "additional items" (*a*).

The Special Rate.—In rural areas, however, the matter is necessarily more complex, because rural district councils themselves often undertake work which is beneficial only to particular parts of their areas. Thus water supply or sewage works may have been carried out by the rating authority, acting as a public health authority, for the advantage only of the more populous parts of its area. In order that the financial burden of such works may be cast only upon the ratepayers of the parts benefited, § 190 of the Local Government Act, 1933, divides the expenses of rural district councils into "general" and "special expenses" (*b*). Hence the Act of 1925 requires rural rating authorities to make and levy, in exactly the same way as urban rating authorities do, a general rate at a uniform amount in the pound for the expenditure incurred by the rating authority itself or by precepting authorities for the benefit of the whole area, and there may be collected with it as additional items any amounts which, while not being special expenses, are separately chargeable to any part of the

(*z*) For instance, under a precept in a rural area from a parish council or parish meeting.

(*a*) Rating and Valuation Act, 1925, § 2.

(*b*) "Special expenses" include, in addition to those mentioned in the text (1) expenses incidental to the possession of property held in trust for any "contributory place"; (2) any other expenses incurred by the rural district council in respect of any "contributory place" which the Minister of Health may determine to fall within that category: Public Health Act, 1936, § 308; Local Government Act, 1933, § 190; (3) certain expenses under the Housing Act, 1936, § 116. A "contributory place" means (1) a rural parish no part of which is in a special purpose area under the Public Health Act, 1936, § 12; (2) such a special purpose area; and (3) that part of a rural parish which is left after deducting therefrom the area of a special purpose area: Local Government Act, 1933, § 305; Public Health Act, 1936, § 343. Special purpose areas may be constituted by resolution of the rural district council approved by the Minister of Health in order to obtain the definition of an area benefited by such works, so that special expenses may be charged thereon exclusively. It is now provided, however, by the Rural Water Supplies and Sewerage Act, 1944, § 6, that, notwithstanding the Public Health Act, 1936, § 308, all expenses of a rural district council in connection with sewerage or water supply must be defrayed as general expenses.

rating area (c). At the same time, however, a "special rate" is made upon the ratepayers of each separate parish to cover the special expenses which affect only that part (d). But a peculiarity in the incidence of the special rates must be noticed: they are only charged on one-quarter of the rateable value of land covered with water, and canals and railways (e). This relief from the full burden of the special rates is derived from the Public Health Act, 1875, and is based upon the fact that the special expenses, which special rates finance, are incurred in respect of services of a public health nature which benefit rather the people living in rural areas than these special classes of property which happen to be situated within their boundaries. However, the requirement that the expenditure on some particular service shall be treated as falling within "special expenses" does not compel the rural district council to charge the whole amount to the "contributory places" benefited. The council may instead decide to widen the area of charge by contributing as part of its "general expenses" either the whole or part of such expenditure, with the result that the whole district will pay (f). Indeed in some matters this principle of spreading the cost has been carried still further, and a county council may contribute towards the expenses of a non-county borough or district council in connection with hospital accommodation, sewerage, or water supply (g), and towards the expenses incurred by other authorities in lighting county roads (h).

Levying Rates:—Having made the necessary rates, the rating authority issues demand notes to the occupiers of rate-

(c) Rating and Valuation Act, 1925, § 2 (5). Exceptionally the expenses incurred by a rural parish under the Lighting and Watching Act, 1833, for which a precept is issued to the rating authority, are not treated as additional items, but are to be levied as part of the special rate: Rating and Valuation Act, 1925, § 3.

(d) Rating and Valuation Act, 1925, § 3.

(e) Similarly in regard to tithe-rentcharge before its abolition by the Tithe Act, 1936.

(f) Local Government Act, 1933, § 190.

(g) Public Health Act, 1936, § 307. Under the Rural Water Supplies and Sewerage Act, 1944, a county council must contribute towards the cost of approved schemes.

(h) Road Traffic Act, 1934, § 23.

able hereditaments in its area requiring the payment of the amount due from each ratepayer. The law prescribes that the rating authority must specify in the demand note for what purposes and for what authorities the different amounts making up the total rate are being raised (*i*). The disproportionate expenses of collecting large numbers of small amounts from occupiers has led to provisions enabling the rating authority to make arrangements for rating the owners rather than the occupiers of small properties. Such an arrangement may be imposed by the rating authority without the consent of the persons affected in the case of properties of a rateable value not exceeding thirteen pounds where the rent is collected at intervals less than quarterly. In return the owners of such properties are entitled to a discount. Above the limit of thirteen pounds rateable value compounding agreements may be made between the rating authority and property owners under which in return for a discount the latter pay the rates or collect them for the rating authority (*j*).

The only remedy available to a rating authority to compel payment of the rates demanded and due to it is by distress warrant issued by the justices, and there is no right to sue for rates by action (*k*).

Principle underlying the Incidence of Rates.—Though originally intended to be based on the ratepayer's means, the law of rating, by its later restriction to the evidence of such means furnished by the rateable value of the hereditament occupied by the ratepayer, has come to rest on the benefit received by the ratepayer, as is clearly shown by the limitation of liability for rates to the occupiers of land, and by the fact that lands covered by water, etc., in rural areas are partially exempted from liability for special expenses. The limitation has frequently been attacked as unfair, and de-rating is an attempt to cure this defect in part by relieving agricultural land wholly and industrial premises partly of the burden of the

(*i*) Rating and Valuation Act, 1925, § 7.

(*j*) *Ibid.*, § 11.

(*k*) *Liverpool Corporation v. Hope* [1938] 1 K.B. 751; [1938] 1 All E.R. 492; Digest Supp. In the case of a limited company it may, however, be possible to proceed by presenting a winding-up petition: *Re North Bucks. Furniture Depositories, Ltd.* [1939] Ch. 690; [1939] 2 All E.R. 549; Digest Supp.

rates which fell upon them (*l*). The occasion upon which the de-rating scheme was brought into force was one of grave unemployment, and in part, no doubt, de-rating was an attempt to find some cure for the general industrial position. But this fact should not blind us to the truth that the de-rating provisions form an attempt to deal with a real and more than temporary problem.

Principle underlying the Incidence of Taxes.—In sharp contrast to the principle underlying the system of rating is the basis of the greater part of Imperial taxation, which rests in general rather upon the means of the taxpayer than the benefit which he as an individual receives from the Government's activities (*m*). Thus, for instance, the wealthy surtax payer is taxed heavily because he can afford to pay, but the money provided by him may well be used towards defraying the cost of old age pensions paid to the poor. De-rating, by cutting off important sources of income for local authorities, has led to the recognition that they should be compensated by increased grants in aid coming from the funds of the Central Government. These funds are raised by taxes, and therefore the introduction of de-rating has involved the consequence that an increased proportion of local government services has now come to be financed by money raised on the basis of "means to pay" and less on the basis of "benefit received." This result is symptomatic of a more general change in the attitude towards local government services. Formerly services such as the poor law, where individuals other than the actual ratepayers benefited, were regarded as exceptional. The coming of public health legislation, furthered by the introduction of education as a local government service, has, however, shown that local government can no longer be based solely upon the provision by the ratepayer of benefits individually to be enjoyed by himself, and the tendency now is rather to regard as normal a service which

(*l*) The Agricultural Rates Acts, 1896 and 1923, had anticipated this reform by relieving agricultural land of one-half, later extended to three-quarters, of the rates falling upon it.

(*m*) Cf. *Re A Reference under the Government of Ireland Act, 1920* [1936] A.C. 352; [1936] 2 All E.R. 111; Digest Supp.

enables the community to confer some advantage upon its less favoured members. Consequently the increased extent to which services are financed on a means basis is not out of harmony or inconsistent with ideas underlying the services which modern local government undertakes. The consideration of this change leads to the necessity for attempting to explain the grants in aid by the extension of which it has largely been brought about.

3. Grants in aid.—Grants in aid form an important part of the income of local authorities. These, as already mentioned, are sums annually paid out of moneys provided by Parliament to assist local authorities in the maintenance of their services. The introduction of de-rating has been the means of compelling the reorganisation of the system under which these grants were paid, but to understand the present position, it is necessary to glance at the history of its development.

Reasons for making Grants in aid.—Grants in aid first grew up in the thirties and forties of the last century. The first Government grants to local authorities were made to compensate the agricultural interest for the repeal of the Corn Laws, by relieving it to some extent of the burden of rates, and the number of grants has grown greatly, especially in the twentieth century. Two principles were, however, early laid down as governing this system of aiding local government out of central taxation: grants were to be specifically earmarked for the assistance of particular services, and their payment to each local authority was to be conditional upon the efficiency of that authority in the maintenance of the services concerned.

Grants in aid have been introduced for three reasons, and instances of their employment are to be found under each heading. Sometimes a grant in aid is made to stimulate a new service: local authorities will undertake the performance of the service because they know that by so doing they will earn large grants from the Government, and at the same time the State, by its power to withhold grants, is able to set the standard of efficiency which it desires to see reached. This practice has

been frequently resorted to, particularly in the present century, but it is open to the serious criticism that it may amount to little more than ordering, or even bribing local authorities to carry out work for the whole community—which can hardly be called true *local* government.

Sometimes, however, the introduction of grants in aid has been based upon a desire to relieve the increased burden of rates which the growth of new services has brought about. From the fifties discussion has centred upon the pressure of the rates, increasing with every new piece of legislation by which the Government forced new undertakings and consequently new expenditure upon local authorities. The Central Government, by this imposition of new services, was forcing the pace at which local authorities were compelled to spend money, and it was suggested that this fact required the State to make some contributions towards the resulting cost. Argument on these lines led to an attempt to distinguish between local government services as “beneficial” and “onerous,” according as their maintenance was rather for the advantage of the local ratepayers, as in the case of sanitation, or of the nation as a whole, as education, and it was said that the proper sphere for Government grants lay in affording assistance towards the maintenance of the onerous services. Though never officially accepted, the tendency in practice has been to approximate to this suggested principle, which can, however, hardly afford more than a rough division of services since such matters as public health easily slip from the beneficial to the onerous class.

Lastly, grants in aid have become necessary to compensate local authorities for the loss of income arising from attempts to cure defects in the law of rating by giving relief to certain classes of ratepayers. Thus grants became necessary when relief was given to agricultural land (*n*), and more especially when the de-rating provisions (*o*) came into force.

(*n*) Agricultural Rates Acts, 1896 and 1923.

(*o*) Rating and Valuation (Apportionment) Act, 1928, and Local Government Act, 1929, §§ 67 and 68.

History of Grants in aid: (i) Percentage Grants.—The history of the grants made in the past for these reasons may very roughly be divided into three periods and discloses two opposing principles at work. From 1835, when the first grant to local authorities was made towards the cost of transporting convicted prisoners and of prosecutions at assizes and quarter sessions, until 1887, the grants which Parliament increasingly provided were exclusively of the character of “percentage grants.” That is, the grant received by any particular local authority was determined by the sum expended, or by the amount of work performed by that authority itself. All those grants were moreover earmarked for the support of particular services, and through their medium the Central Government was enabled to secure efficiency of local administration. The due sums were paid by the Exchequer, out of the general pool of taxes at its disposal, direct to the local authorities to whom this State assistance was being given. An example is afforded by the police grant first introduced by the County and Borough Police Act, 1856 (*p*). Under that Act a grant equal to one-quarter of the cost of pay and clothing of police forces was introduced, and increased to one-half of the cost in 1874 (*q*). These sums were paid by the Exchequer to each county and borough maintaining a separate police force on the certificate of the Home Secretary that the force in question was efficient in point of numbers and discipline.

(ii) Assigned Revenues.—In 1888, with the passing of the Local Government Act creating county councils and county boroughs, a new principle came into evidence which impinged upon, but did not wholly supersede the earlier principle inherent in percentage grants. It was felt to be desirable in some way to broaden the basis of rating and so to enable local authorities to raise revenue from sources of income additional to immovable property. The satisfaction of this desire was found in the assignment to local authorities of the proceeds of certain taxes which were regarded as at once having a local

character and being capable of further expansion with increased prosperity. But simply to substitute these "assigned revenues" for the existing grants in aid would have led to difficulties. In the first place, the percentage grants were being made to almost all classes of local authorities, some of whose areas were wholly contained within, or actually overlapped the boundaries of others. For instance, grants were being paid to counties, boroughs, sanitary authorities and poor law unions, and great difficulties would have been experienced in attempting to assign directly to each of these authorities the revenues produced by taxes regarded as arising within its district. The result was that the revenues of these taxes had to be directly assigned to a class of large authorities which together covered the whole country, and provision had to be made for passing on to smaller authorities the sums which they needed to compensate them for the loss of direct grants. Secondly, there was no wish to lose the control over local authorities which percentage grants had been the means of giving to the Central Government, and so provisions were added requiring payments to be made out of the assigned revenues, which had the appearance at any rate of the percentage grants which they replaced.

The system introduced in 1888 was complicated in the extreme, and before its abolition by the Local Government Act of 1929 certain important modifications were made in its working. It is necessary to the understanding of the present law to have some slight acquaintance with the system of assigned revenues, and its outline must here be sketched (r).

The two taxes originally selected, as having a sufficiently local character and "expanding" nature to become the assigned revenues under the Act, were various licence duties and forty per cent. of the amount collected in probate duty. In 1894, when the estate duty was introduced and probate

(r) See Local Government Act, 1888, §§ 20-27 and 32-34. For a fuller description see E. Cannan, *The History of Local Rates in England*, chap. vi; Redlich and Hirst, *Local Government in England*, vol. ii, pp. 92-99.

duty abolished, an equivalent amount out of the new tax was substituted for the old grant (s). These taxes continued to be collected by the Central Government and were paid into a "Local Taxation Account," the appropriate sums due to local authorities under the Act of 1888 being paid over to them by the Exchequer. In 1908, however, the actual collection of certain of the licence duties was transferred by Order in Council to the councils of counties and county boroughs (t). One of the essential characteristics of the scheme was, however, destroyed in 1910, when the sums derived by local authorities from certain of the licence duties were fixed in amount, any further increase in them being diverted to the Exchequer (u). Thus the principle of an "expanding" assigned revenue was abandoned.

Distribution of Assigned Revenues.—The local authorities chosen by the Local Government Act of 1888 to be the direct recipients of these assigned revenues were county councils and county borough councils, and the greater number of the old percentage grants were at the same time abolished. The new probate duty grant was divided among counties in proportion to the losses incurred by each of them through the abolition of the older grants, while the actual sums raised in each county from the licence duties were returned to it by the Exchequer. But the proportions, in which the county councils and the councils of any county boroughs situated in the geographical county were to share these assigned revenues, had yet to be fixed, and the Act provided for their division in accordance with "equitable adjustments" to be made between the individual authorities either by agreement or by the award of Commissioners. These adjustments might be re-opened at intervals of not less than five years.

When the amounts payable out of the assigned revenues by the Exchequer to each county council and county borough council had thus been determined, the Act proceeded to lay

(s) Finance Act, 1894, § 19.

(t) Made under the Finance Act, 1908, § 6.

(u) Finance (1909-10) Act, 1910, § 88; Revenue Act, 1911, § 18.

down how each of these local authorities was to deal with the sums it received. Each council was required to transfer its "assigned revenue grant" to a separate account to be called the "Exchequer Contribution Account." Out of that account it was required in the first place to transfer to other authorities and to its own separate accounts sums intended to replace the old percentage grants which the Act had abolished. Thus a county council had to pay to boards of guardians within the county grants in respect of poor law teachers, officers, pauper lunatics, etc.; to sanitary authorities one-half of the salaries of medical officers of health and inspectors of nuisances employed by them in accordance with the provisions of the Public Health Act, 1875; and to every borough maintaining a separate police force one-half of the cost of pay and clothing of its police officers, while it was required to transfer to its own police account a sum arrived at in the same way in respect of the county force. Similar obligations rested upon a county borough council, except that, as there were no smaller authorities with which it could deal other than boards of guardians, it only was necessary for it to transfer to its own separate account the grant in respect of its police. After those various grants had been paid out of the Exchequer Contribution Account, any balance was available as a general and unassigned grant in aid of the county council or county borough council in question.

Central Control through Assigned Revenues.—The whole scheme in effect amounted to a transfer of part of Imperial taxation to county councils and county borough councils, these latter authorities thereupon being obliged out of the assigned revenues to pay to themselves and other authorities sums representing the older grants. The control effected by the power to withhold grants was also retained. Thus if a local sanitary authority failed to satisfy the conditions, on which alone it could claim the grant in aid of the salaries of its medical officer of health and inspectors of nuisances (*v*),

on the certificate to that effect of the Local Government Board, the sum was forfeited to the Crown and payable by the county, out of its Exchequer Contribution Account, to the Exchequer instead of to the local authority. Similarly, if the Home Secretary certified that a county or county borough police force was not efficient and so not entitled to retain its grant, the sum involved had to be paid to the Exchequer, while if it was a non-county borough which failed to earn its police grant, the county council was simply absolved from the necessity of making the payment and might retain the sum in question in aid of general county purposes.

(iii) Further Percentage Grants.—The introduction of this system of assigned revenues did not, however, come at a time when the expansion of local government service had reached its limits, and new services, in respect of which all the old arguments for State assistance were applicable, were subsequently introduced. The inevitable result was that there was a reversion to the older principle of direct percentage grants, earmarked to the support of those new services as they came into existence. Police pensions, education, roads, small holdings, housing, and certain health services received new percentage grants piecemeal, and those new grants were paid directly by the Central Government to the authorities to be benefited.

Before the reforms effected by the Local Government Act, 1929, grants in aid were, therefore, either earmarked for the support of particular services or given in the form of the assigned revenues under the Act of 1888. In either case, however, at least to a considerable extent, they partook of the nature of percentage grants, being determined by the amount expended by the local authority itself upon the service in question. But expenditure is no true criterion of need. A poor local government area may, simply because it is poor, need to spend more money than it can afford to raise, and the percentage system further leads to local authorities leaning too much upon Central Departments for suggestions as to the

expenditure to be undertaken by them, and consequently to an unnecessarily great degree of central control over the details of expenditure, often to the disregard of broader issues of principle.

(iv) **The Block Grant.**—De-rating involved as a necessary corollary a great increase in grants, and, since the loss of rates to local authorities could not be regarded as earmarked to any particular services but affected their general income, it followed that these grants must also be of general application. This, therefore, formed an admirable opportunity for the reform of the whole grant system and the Local Government Act of 1929 largely substituted for the older percentage grants new “block” grants, that is, grants which are not specifically earmarked for the maintenance of particular services, but are given to local authorities in aid of their general income to be expended by them at their own discretion, and which are not calculated upon the amounts spent by the authorities receiving them.

Remaining Percentage Grants.—The Local Government Act, 1929, provided for the discontinuance of the system of assigned revenues introduced by the Act of 1888 though it left untouched the licence duties directly collected by county and county borough councils. These “local taxation licences” are therefore still levied by these authorities in general aid of their finances (*w*). The Act also discontinued a number of

(*w*) After various changes in the scheme introduced by the Local Government Act, 1888, these local taxation licence duties collected by county and county borough councils consisted of those in respect of dealing in and killing game, dogs, guns, armorial bearings, male servants, and motor vehicles and carriages. The Finance Act, 1937, § 5, abolished the licence duty on male servants, and the Finance Act, 1944, abolished those on armorial bearings and carriages and hackney carriages. The Local Government Act, 1929, § 105, provided that the duties should be applicable for the general purposes of the councils of counties and county boroughs so collecting them. The result is that county and county borough councils still collect and keep for their own use the duties on game, dogs and guns, while they collect the duties on mechanically-propelled vehicles and carriages, receiving only their costs of collection and compensation for the old local licensing fees. The profound alteration of circumstances resulting from the introduction of the Local Government Act, 1929, made necessary the making of new equitable adjustments between county and county borough councils situate in the same geographical county as to the distribution of the local taxation licence duties: Local Government Act, 1929, § 85; *Liverpool Corporation v. Lancashire County Council* [1937] Ch. 190;

percentage grants in aid of services in respect of which it was felt that the time was ripe for some relaxation of a detailed central control (x). In the case of other services, which had received grant aid either out of the assigned revenues or by way of direct Government assistance, percentage grants were either re-introduced or retained. The result was that, broadly speaking, five classes of particularly onerous services remained still the recipients of direct percentage grants. These surviving percentage grants are paid in respect of:—

(a) **Police.**—The police grant, now divorced from the system of assigned revenues, has once more reverted to its original character. Grants of one-half of its expenditure are made to each police authority upon the Home Secretary being satisfied that the force maintained by it is efficient (y).

(b) **Education.**—Varying grants on the net expenditure of local education authorities together with additional grants to the poorest areas, and grants at special rates in respect of expenditure on school meals and milk, are made by the Ministry of Education on certain conditions designed to secure efficiency (z).

(c) **Housing.**—The acute shortage of houses after the War led to Government subsidies and grants to local authorities to [1936] 3 All E.R. 945; Digest Supp. The licence duties in respect of motor vehicles and carriages as to any increase over the amounts collected in the year 1908-9 were diverted to the Exchequer: Finance (1909-10) Act, 1910, § 88; Revenue Act, 1911, § 18. The Roads Act, 1920, which substituted a new system of licence duties for mechanically-propelled vehicles and abolished local licensing fees (§ 14), provided for their collection by county and county borough councils as agents of the Road Fund it created (§ 1). It charged on the Road Fund (i) a payment in favour of the Local Taxation Account equivalent to the amount raised in the year 1908-9 in respect of motor vehicle and carriage licences, (ii) the expenses of county and county borough councils in levying the licence duties, and (iii) a sum in compensation for the abolition of the local licensing fees (§§ 2 and 3). The payment in favour of the Local Taxation Account was abolished by the Local Government Act, 1929, § 87.

(x) Local Government Act, 1929, § 85 and 2nd Schd.

(y) County and Borough Police Act, 1856, § 16; Police (Expenses) Act, 1874; Local Government Act, 1888, § 24; Police Act, 1919, § 8; and increased to one-half the total expenditure under annual Supply Votes since 1919. These statutory provisions governing police grants were repealed by the Local Government Act, 1929, 12th Schd., and grants are now wholly paid under annual Supply Votes.

(z) Education Act, 1944, §§ 100 and 101.

encourage the building of houses. These were based either on the payment of all expenses over a fixed minimum or on the percentage principle in accordance with the amount of building, and, as they involve the payment of annual sums over a long period of years to compensate for immediate capital expenditure by the authorities concerned, their basis had necessarily to be left unchanged. Grants are still being paid in respect of houses built under the earlier Acts of 1919, 1923 and 1924 (*a*), but no grants have been payable, except in connection with slum clearance and cognate special functions (*b*), in respect of new houses built after 1932 (*c*).

Now, however, the restrictions on the payment of grants in respect of houses built by local authorities have been removed and in fact the scope of grant has been widened to include not only houses "for the working classes" but houses for general needs (*d*). The new rates of grant, however, have not yet been fixed, although legislation is before Parliament.

(d) Roads.—The introduction of motor vehicles led to the requirement of a national system of roads, and since 1909 a Road Fund, has been in existence, from which grants were made to local authorities on a percentage basis for ordinary upkeep and improvements and new works (*e*). Under the Local Government Act, 1929 (*f*), county councils received a great increase in their duties as highway authorities. Formerly they were responsible for the upkeep only of main roads, but now they have become the highway authorities for all roads in their counties other than unclassified roads in urban districts. The

(*a*) Housing, Town Planning, etc., Act, 1919, § 7; Housing, etc., Act, 1923, § 1; Housing (Financial Provisions) Act, 1924, §§ 1 and 2.

(*b*) See below, pp. 532–538.

(*c*) Housing (Financial Provisions) Acts, 1933 and 1938.

(*d*) Housing (Temporary Provisions) Act, 1944.

(*e*) See Development and Road Improvement Funds Act, 1909, § 8; Ministry of Transport Act, 1919, § 17; Roads Act, 1920, §§ 3 and 4 and 1st Schd.; Finance Act, 1926, § 42; Road Traffic Act, 1930, § 57; Restriction of Ribbon Development Act, 1935, § 19; Trunk Roads Act, 1936, § 9. The Road Fund was originally created out of the duties levied on motor vehicles, but under the Finance Act, 1936, § 33, these cease to be payable to the Fund, which instead is to consist of moneys provided by Parliament.

(*f*) §§ 29–31.

position of county boroughs, however, remained unchanged, and, to meet this difference in the obligations cast upon these two classes of road authority, the Act had to treat them differently. Consequently the percentage grant for classified roads is still payable to county councils, but was abolished in London and county boroughs. The grant in respect of the maintenance of unclassified roads was everywhere abolished. The result is that specific grants for the maintenance of classified roads are now paid only to county councils, while all highway authorities continue eligible for special percentage grants in respect of improvements and new roads or bridges (*g*).

(*e*) **Miscellaneous.**—Although the public health service has never been grant-aided as a whole, yet, as we have already seen, several grants were introduced for particular functions as its boundaries were extended by successive statutes. Almost all of these grants have now been abolished, but there were retained a few small percentage grants which continue to be payable, as, for instance, in respect of the training of midwives, and health visitors (*h*). Other instances of continuing percentage grants include police pensions and small holdings.

The General Exchequer Grant.—Subject to these five exceptions, all other important percentage grants were abolished. To replace these discontinued grants and to compensate for the losses incurred by de-rating, local authorities now receive a block grant known as the general exchequer grant. The machinery, both for determining the amounts of these new block grants and for their actual distribution among local authorities, is complex in the extreme and must now be explained.

The General Exchequer Contribution.—Under a system of percentage grants both the amount each local authority is to receive and consequently the total sum of money the Central Government has to provide each year are easily calculated from the actual expenditure of the local authorities concerned. Where block grants obtain, however, no such simple method

(*g*) Local Government Act, 1929, § 135 and 2nd Schd.

(*h*) *Ibid.*

of calculation exists and the process has in effect to be reversed, the Central Government having first to determine the total amount of money it can dispose of in this way, and only when this has been done being able to consider the question of its division among local authorities. Hence the Local Government Act, 1929 (*i*), provided in the first place for a notional central fund, or pool, called the "general exchequer contribution" (*j*). This fund was composed of three sums of money: the estimated loss of rates consequent upon de-rating, which has been calculated to be £22,292,203; the amount of the discontinued grants, being £16,279,706; and a sum of new money provided by the State and designed to make such fundamental changes in local government finance attractive to local authorities. The whole scheme obtained elasticity by the provision that the amount of this third sum of new money should be fixed from time to time by Parliament for what are called "fixed grant periods," the first being for three years after the Act came into force, the second for the succeeding four years, and every subsequent one for five years. For the first fixed grant period the new money was fixed at £5,000,000 per annum, so that the total amount annually flowing into the general exchequer contribution, with the sums provided to compensate for loss of rates and to replace the discontinued grants, was £43,571,909. Moreover, it was provided that, in fixing the amount of new money in any succeeding fixed grant period, Parliament should not permit it to fall below a figure which would maintain, for the first year of that fixed grant period, the ratio between the general exchequer contribution and the total expenditure borne by local authorities out of rates and general exchequer grants in the penultimate year of the preceding fixed grant period (*k*). Under this provision the amount of new money for the second fixed grant period was fixed at £5,350,000 (*l*), making a total general

(*i*) § 86, as amended by the Local Government (Financial Provisions) Act, 1937, § 1 and 2nd Schd.

(*j*) § 87, providing for a contribution from the Road Fund, was repealed by the Finance Act, 1936, § 33 and 3rd Schd.

(*k*) Local Government Act, 1929, § 86.

(*l*) Local Government (General Exchequer Contribution) Act, 1933.

exchequer contribution of £43,921,909. When, however, the time for fixing the new money for the third fixed grant period arrived, it was found that its amount, calculated so as to preserve the statutory ratio between the general exchequer contribution and the amount of rate and grant borne expenditure of the local authorities, should have been about £9,777,000. But certain new factors had come into play which made it necessary to modify the provision binding Parliament not to reduce the statutory ratio. In the first place, it was desired to simplify accounting by abolishing the liability of public assistance authorities to contribute to the Unemployment Assistance Board sums proportionate to the savings in their expenditure consequent upon the Board assuming responsibility for the able-bodied unemployed (*m*). Secondly, the transfer to the Minister of Transport of the highway functions of local authorities in respect of certain highways of national importance (*n*); and, thirdly, the abolition of the male servant licence duty (*o*), which was still collected by county and county borough councils for their own use as a legacy of the system of assigned revenues (*p*), further affected the position. A rough balance was struck between these figures, and the amount of new money for the third fixed grant period was fixed at about £7,600,000, making a total general exchequer contribution of £46,172,000 per annum (*q*). At the same time the provision, binding Parliament not to reduce the ratio between the general exchequer contribution and the amount of rate and grant borne expenditure, was restated in the light of the changed circumstances as an obligation, in fixing the amount of the general exchequer contribution for any succeeding fixed grant period, to settle upon a sum which would not be less than twenty-two and a half per cent. of the total rate and grant borne expenditure in the penultimate year of the preceding fixed grant period (*r*).

(*m*) Unemployment Act, 1934, § 45.

(*n*) Trunk Roads Act, 1936.

(*o*) Finance Act, 1937, § 5.

(*p*) See above, p. 178.

(*q*) Local Government (Financial Provisions) Act, 1937, § 1.

(*r*) *Ibid.* The amount of the general exchequer contribution for this purpose is to be exclusive of any increase therein made under the Midwives Act, 1936, § 4: see below, p. 188. The third grant period was from April 1,

The Formula of "Weighted Population."—Having noted in what way the central fund from which the block grants are to be made to local authorities is set up, we must next see how it is divided up and distributed among them. For this purpose the first stage in the distribution of the central general exchequer contribution is to divide it among counties and county boroughs, or, in other words, to determine how the "county apportionments" and "county borough apportionments" are to be found (s). For this purpose use is made of a "formula," the application of which shows what share of the central fund each county or county borough is to receive as its apportionment. The Local Government Act, 1929 (t), based this formula on the population of the county or county borough, suitably "weighted," or notionally increased, by factors based on (1) its rateable value, (2) the number of children therein under school age (u), (3) the number of unemployed persons therein, and (4), in the case of counties, but not of county boroughs, the sparsity of the population as compared with the road mileage in the county. This formula for determining the "weighted population" was admittedly an empirical construction designed to spread the incidence of the new grant where it was most needed (v);

1937, until March 31, 1942, so that, apart from further legislation, a recalculation of the block grant for a new five years' period would have had to be made in 1942. In view of the abnormal circumstances created by the war, this course was regarded as too difficult, and, accordingly, the third fixed grant period was, by the Local Government (Financial Provisions) Act, 1941, continued until such date after the expiry of the Emergency Powers (Defence) Act, 1939, as Parliament may hereafter determine. During the term of extension, the amounts to be paid are stabilised at the amount of the grants paid for the fifth year of the third period, and certain schemes relating to health services, which provided for financial apportionments in respect of the fifth year of the third period, have therefore been extended.

(s) Local Government Act, 1929, § 88.

(t) 4th Schd., Part III.

(u) *I.e.* under five years.

(v) The apportionment payable to any given county or county borough is that fraction of the general exchequer contribution which represents the proportion which the weighted population of the area bears to the total weighted population of the whole country. Expressed mathematically, if w = the weighted population of the county or county borough in question, and t = the total weighted population of the whole country, then the county or county borough apportionment = $\frac{w}{t} \times$ general exchequer contribution.

but its experimental nature was recognised in the requirement of an investigation into its working before the end of the second fixed grant period (*w*). This investigation commenced in 1935 and resulted in the Local Government (Financial Provisions) Act, 1937, which, while keeping the basis of the formula upon population weighted for low rateable value, children under school age, unemployment and, in counties, sparsity of population in relation to road mileage, yet increased the effect of the weighting produced by these two last factors (*x*).

The factors chosen to weight the population of a county or county borough may seem to have little logical justification, but their choice is based on the fact that they do provide a ready, though perhaps unscientific test of the needs of an area (*y*). Thus experience has shown that the number of unemployed persons in an area may have a two-fold influence on the finances of the local authority, increasing on the one hand the cost of public assistance and possibly of the health service, and on the other hand tending to reduce the capacity of the population to pay rates. Again, the number of children under school age is an indication of the probable cost of many health services, while the relation between actual population, rateable value and road mileage clearly has an important bearing both on the expense of maintaining services in the area and on the possibility of raising locally the money necessary to pay for them. Thus the formula seeks to secure a just apportionment of grant as between comparatively prosperous and depressed areas. In this respect the formula is a distinct advance upon the older system of percentage grants, which took account only of the expenditure and not of the needs of local authorities. Obviously the various factors in the formula, and with them the needs of the authorities concerned, will change from time to time, and consequently

(*w*) Local Government Act, 1929, § 110.

(*x*) § 2 and 1st Schd. For an outline of the formula of weighted population, see Appendix below, p. 795.

(*y*) The working of the revised formula has, in turn, to be investigated before the end of the fourth fixed grant period: Local Government (Financial Provisions) Act, 1937, § 8.

provision is made for recalculating the weighted population of each county and county borough at the commencement of each fixed grant period (*z*).

General Exchequer Grants.—So far we have reached the end of the first stage in the process of distributing the general exchequer contribution, and we must now consider how the county and county borough apportionments are dealt with. In the case of county boroughs there are no smaller local authorities to consider, for the council of a county borough itself performs the functions of a county council, and a borough council, and under the Act of 1929 became the poor law authority for its area. Consequently, its county borough apportionment is paid in full to the council of each county borough and is wholly retained and spent by it, as its general exchequer grant, in the maintenance of its local government services. In counties, however, other lesser authorities are interested in the county apportionment, as the source of their general exchequer grants. In other words, the determination of the county apportionment is only the first stage of distribution ; in its turn this sum must be divided between the county council and the councils of the districts lying in the administrative county. In this second stage of division the shares of the county apportionment which are to be paid to district councils are not determined by the formula, but simply by the actual population of the districts concerned, since the activities of district councils are mainly confined to public health services which depend for their cost almost exclusively upon the number of persons residing in the area. As the cost of such services is less in thinly populated rural districts while at the same time rural district councils, unlike their urban counterparts, have no highway functions to perform, the Act provides

(*z*) The Local Government (Financial Provisions) Act, 1941, extended the third fixed grant period which would normally have terminated on March 31, 1942, to such date after the expiration of the Emergency Powers (Defence) Act, 1939, as Parliament may determine. Before this date it is likely that the financial relations between local authorities and the Exchequer will be reviewed, in accordance with an assurance given on October 3, 1944, by the Chancellor of the Exchequer (Hansard, Vol. 403, Col. 752).

that non-county borough councils and urban district councils are to receive, in proportion to their populations, five times the amount given to rural district councils. These sums, paid out of the county apportionment, are the general exchequer grants of the urban and rural district councils receiving them (a), while the balance remaining is the general exchequer grant of the county council itself (b).

Application of the Formula.—A further set of complications was, however, added to this new system for the provision of block grants to local authorities. The scheme adopted in determining the amounts of these general exchequer grants was designed to make grants in aid applicable rather where they were needed than where the greatest expenditure had been made. But such a change could not be made immediately without upsetting the finances of many local authorities or at least arousing their opposition. Consequently, to smooth over the transition stage, the Act of 1929 provided that the application of the formula should not at once govern the distribution of the whole central general exchequer contribution. At first its division into county and county borough apportionments was to be determined rather upon the basis of loss caused by the discontinuance of the old percentage grants and by de-rating. Gradually the formula was to be made to govern the distribution of a greater proportion of the amounts received by these authorities, until finally the whole general exchequer contribution is divided solely in accordance with the formula (c).

(a) Local Government Act, 1929, § 91 and 4th Schd., Part IV. The sum to be allocated to an urban district is discovered by multiplying a constant figure (in the present fixed grant period, 12s. 1d.) by the population of the district, while in a rural district the sum found by multiplying one-fifth of this figure (*i.e.* at present 2s. 5d.) by the population. If the amount of the county apportionment is less than the amounts required to be paid to county district councils, the deficiency is to be made up partly by the county council and partly out of moneys provided by Parliament: Local Government (Financial Provisions) Act, 1937, § 3.

(b) Local Government Act, 1929, § 89.

(c) During the first two fixed grant periods three-quarters of the general exchequer contribution was divisible in proportion to the loss of grants and rates; during the third period the figure is one-half, and during the fourth

“Additional” and “Supplementary Exchequer Grants.”—Again, local authorities have been promised that the new system shall produce at least a gain of one shilling per head of the population of their areas, and to fulfil this promise it has been necessary to provide for the payment of “additional exchequer grants” to any county or county borough which can show that in its case such a gain has not been realised (*d*). Lastly, to prevent any rise in local rates as a result of de-rating or the change in the system by which grants are made, a “supplementary exchequer grant” is paid to county boroughs, non-county boroughs and county districts suffering a loss in consequence. This is fixed in amount for the first five years after the coming into force of the Act, and thereafter it decreases by one-fifteenth in each year, so that it will finally disappear when the Act has been in force for twenty years (*e*).

New Grants in Aid.—A further guarantee to local authorities was given by § 135 of the Local Government Act, 1929, which declared it to be

“the intention of this Act that, in the event of material additional expenditure being imposed on any class of local authorities by reason of the institution of a new public health or other service . . . provision shall be made for increased contributions out of moneys provided by Parliament.”

one-quarter; in each case the formula applies to govern the division of the balance. Thus the whole of the general exchequer contribution will only become divisible solely in accordance with the formula among county and county borough councils in the fifth and later fixed grant periods: Local Government Act, 1929, §§ 88 and 134.

(*d*) Local Government Act, 1929, §§ 90 and 96, as amended by the Local Government (Financial Provisions) Act, 1937, § 4.

(*e*) Local Government Act, 1929, §§ 94 and 97. Power to modify the rate of reduction in the case of hardship is given by the Local Government (Financial Provisions) Act, 1937, § 6. It is probable that when conditions become more stable there will be an overhaul of the financial relations between the Exchequer and local authorities; in fact an assurance to that effect, and that it would be carried out with a definite bias in favour of the poorer authorities, was given to Parliament by the Chancellor of the Exchequer on October 3, 1944. See the White Paper on Local Government in England and Wales during the Period of Reconstruction (Cmd. 6579/1945).

A direct result of this declaration of policy is to be seen in the Midwives Act, 1936, which imposed on certain authorities the duty of providing a whole-time domiciliary service of midwives, and which accordingly provided for the payment of grants (*f*), which in the fourth fixed grant period will cease to be paid separately and their aggregate amount will go to swell the amount of the general exchequer contribution (*g*).

Further grants have, however, been introduced since the Local Government Act, 1929, to meet the increase of local authorities' expenditure or the decrease of their income consequent upon legislation. The abolition of tithe-rent-charge affected adversely the rateable value of local authorities and consequently diminished their sources of income. To meet this difficulty the Tithe Act, 1936 (*h*), provides that rating authorities suffering such losses shall receive annual grants in compensation. These grants are payable for a period of sixty years on a gradually diminishing scale. The Physical Training and Recreation Act, 1937 (*i*), empowers the Ministry of Education to make grants towards the capital cost, but not the maintenance, of recreational facilities provided by local authorities. The Air-Raid Precautions Act, 1937 (*j*), extended by the Civil Defence Act, 1939, provides for the payment of grants in respect of expenditure by local authorities in preparing and carrying out schemes for the protection of persons and property from injury in the event of hostile air attack. The grants vary between sixty and seventy-five per cent. of approved expenditure, the variation depending on the needs of the authority in question. As a means of assessing these needs the percentage is made to vary in proportion to the weighting of the local authority's actual population under the formula of weighted population used in connection with the payment of general exchequer grants. There is also a further overriding provision designed to prevent the expenditure left to fall upon the

(*f*) Calculated in accordance with a complicated formula: Midwives Act, 1936, 1st Schd.

(*g*) *Ibid.*, § 4.

(*h*) § 25 and 5th Schd.

(*i*) § 3 (partly repealed by the Education Act, 1944).

(*j*) § 8 and Schd.

rates from greatly exceeding the amount produced by a penny rate.

Special grants are now available to local planning authorities under the Town and Country Planning Act, 1944, in areas of extensive war damage during the first two years (and on certain conditions for longer periods) after they have acquired land that requires redevelopment as a whole or is needed for the "overspill" of population or industry (*k*).

4. Loans.—The income of local authorities is, therefore, made up of revenue from property, rates and grants in aid, but if local authorities were confined to the financing of their services out of revenue their resources would be seriously curtailed. From time to time expensive works have to be undertaken which will be permanently beneficial to the locality, and it is often essential that their cost should be financed by loans charged on the local authority's land or rates. On the other hand, an uncontrolled borrowing power might easily lead to bankruptcy, as the history of many turnpike trusts serves to show, and so safeguards are necessary. The effect of undertaking work financed out of loans and charged to capital account is to spread the cost over a period of years, instead of requiring the ratepayers to meet the whole cost in the year in which the works are undertaken. In other words, this method of financing a local authority's undertakings involves casting a large part of the cost upon future ratepayers, and accordingly loans are only permitted when the money raised will be spent on works of a permanent nature, which will continue to benefit the persons who will have to pay for them (*l*).

Powers of Local Authorities to borrow.—A power to raise loans, like the other powers of local authorities, can only be derived from Parliament (*m*), and may be given either by

(*k*) §§ 5-8.

(*l*) Local authorities have, however, a general power to borrow money temporarily to defray expenses pending the receipt of revenue, and require no sanction to do so: Local Government Act, 1933, § 215.

(*m*) See below, Ch. XII.

general or private Acts. Formerly, as far as powers of borrowing were conferred by general Acts, the position was obscured by two facts. In the first place, only county councils (*n*) and parish councils (*o*) had general powers to borrow money for any purpose for which they might be authorised to raise money by loan. Other authorities had no general powers of borrowing and so, when any Act dealing with a particular service conferred upon them borrowing powers, it either had to construct a set of special provisions or incorporate powers relating to some other service from some other Act. Usually the provisions of the Public Health Act, 1875 (*p*), were incorporated or copied, so that in fact a degree of uniformity was achieved, though only at the expense of symmetrical arrangement. In the second place, however, this very necessity for the creation of special machinery for borrowing tempted draftsmen in special circumstances to vary the provisions they usually adopted, so that the powers of local authorities to borrow money frequently departed from what might be regarded as the standard pattern.

The Local Government Act of 1933 effected a valuable reform in this part of the law. It gave to all local authorities a general power of borrowing, applicable in every case in which an Act of Parliament might confer fresh powers to contract loans for particular purposes, and provided a uniform code of procedure governing the exercise of this general power. But the special circumstances which in the past had led to divergences from the usual practice could not be entirely disregarded, and the Act, therefore, while preserving these exceptions, made them readily intelligible by consolidating their provisions in its Eighth Schedule (*q*).

General Borrowing Power.—The general power of borrowing contained in the Act of 1933 may be employed for a variety of purposes. Provided that the local authority has

(*n*) Local Government Act, 1888, § 69.

(*o*) Local Government Act, 1894, § 12.

(*p*) §§ 233 and 234.

(*q*) Local Government Act, 1933, §§ 198 and 218. See also Public Health Act, 1936, § 310, for a special power to borrow on mortgage of sewage disposal works.

power to do the act which it is proposed to finance by loan, it may borrow to acquire land, to erect buildings or to undertake any permanent work or other thing the cost of which, in the opinion of the Minister of Health, ought to be spread over a term of years (*r*). In addition the general power is applicable for any other purpose for which the local authority is authorised by any enactment to borrow money. Lastly, a county council may borrow in order to lend money to a parish council (*s*).

Sanction to Loans.—Invariably, however, before a local authority can exercise its borrowing powers it must obtain the sanction of some central authority able to safeguard both the interests of future generations of ratepayers and the credit of local authorities in general (*t*). In the case of loans for electricity undertakings this sanction must be obtained from the Electricity Commissioners, and the sanction of the Minister of Transport is required for loans relating to tramways, omnibuses and light railways. But these are narrow exceptions ; in all other cases the Minister of Health alone is the sanctioning authority (*u*).

This concentration of the power to sanction borrowing in the hands of the Minister of Health is obviously dictated by principles of sound finance. In this way it is possible for the whole position of a local authority to be considered whenever it desires to raise a loan and for whatever purpose it proposes to employ the borrowed money. This is the explanation of the rules requiring the Minister's consent to loans contracted for such services as education, in respect of which he has otherwise no concern. The Minister is put in a position in

(*r*) If the proposed borrower is a parish council the county council must also approve.

(*s*) Obviously by borrowing from the county council a parish council will find a cheaper means of raising money than by resorting to the open market itself, since the credit of the whole county will be much better than that of a single parish within it. But see below, p. 194.

(*t*) In the case of a parish council the sanction of the county council must also be obtained : Local Government Act, 1933, § 195.

(*u*) Local Government Act, 1933, § 218. No consent is required to borrowing by a county council in order to lend the money to a parish council, though the Minister may prescribe conditions to be observed in such a case : *ibid.*, §§ 195 and 201.

which he can see not only that loans are contracted solely for purposes which the law permits, but also that the borrowing of money is warranted by the financial resources of the particular local authority in question. In this respect § 74 of the Local Government Act of 1929, which removed the limits to the amount of loans which might be raised by a local authority (*v*), increased at once the importance and the necessity for this control by the Minister over the borrowing powers of local authorities.

Loans must not, of course, be permanent, and the Act provides a maximum period within which they must be repaid. This period is in general sixty years, though in some cases other maxima varying from thirty to eighty years are laid down in particular enactments (*w*). But not every loan may be contracted for the maximum period, for each loan must be repaid during such period as the local authority, with the approval of the sanctioning authority, may decide (*x*). Loans, however they are contracted, whether by mortgage, by the issue of stock or by debentures or annuity certificates under the Local Loans Act, 1875 (*y*), are charged upon all the revenues of the borrowing authority and rank equally (*z*).

Private Acts may confer borrowing powers, and by their promotion local authorities can sometimes escape from the necessity of obtaining the Minister's consent. In fact, however, even in this case it is unusual for the Minister's influence to be

(*v*) Such limits, usually based on a ratio to the rateable value of the local authority's area, were to be found in many Acts; *e.g.* Public Health Act, 1875, § 234, limited the loans to be raised under it to twice the rateable value. De-rating, by often seriously reducing the rateable value of an area, made these provisions no longer practicable.

(*w*) See Local Government Act, 1933, 8th Schd.; Public Health Act, 1936, § 310.

(*x*) Local Government Act, 1933, § 198. Repayment is made in general by a sinking fund; see *ibid.*, §§ 212-214.

(*y*) Local Government Act, 1933, § 196; but parish councils can only borrow by mortgage.

(*z*) Local Government Act, 1933, § 197. A borough council may, however, mortgage its corporate land: *ibid.*, § 217; and a public health authority may borrow on mortgage of its sewage disposal works: Public Health Act, 1936, § 310. The Act contains a variety of supplementary provisions governing the respective rights of the borrowing authority and the lender: Local Government Act, 1933, §§ 200-211.

entirely excluded. The Standing Orders of the Houses of Parliament dealing with the promotion of private Bills contain provisions requiring a strict proof of estimates where it is sought to obtain borrowing powers free from Ministerial approval, and in practice Parliament, in such cases, frequently required the insertion of a clause providing for returns of the expenditure of the borrowed money to be made to the Minister—a provision now contained in the Local Government Act, 1933 (*a*). Thus even by resort to private Bill legislation the scrutiny of the Minister of Health over the loans of local authorities cannot be evaded.

Source of Loans.—In the past there has been no restriction upon the sources from which local authorities might borrow. Normally these were three in number: the open market, the Public Works Loans Commissioners, and internal resources. The financial policy of the Government is, however, to control the borrowing of local authorities during the reconstruction period as part of the policy of securing national financial stability, and, accordingly, local authorities are now prohibited from borrowing any money otherwise than from the Public Works Loans Commissioners. Power is given to the Treasury to approve exceptions to this rule, and the Treasury is also enabled to make regulations exempting local authorities from the operation of this rule in respect of borrowing “in such manner, for such purposes or from such sources as may be prescribed by the regulations.” (*b*)

Power is preserved to local authorities, however, to borrow from moneys forming part of, but not for the time being required for, any capital fund established by the authority; but special conditions are imposed upon the repayment of such moneys and upon the charging of interest, etc. (*c*).

(*a*) § 198.

(*b*) Local Authorities Loans Act, 1945, § 1. The section continues in force only until December 31, 1950, unless Parliament otherwise decides.

(*c*) Local Authorities Loans Act, 1945, § 9.

CHAPTER VII

AUDIT

Safeguards in respect of Local Government Finance.—

Local authorities in the exercise of their functions receive considerable sums of public money, whether raised by rates or coming to them in the form of grants in aid from the funds of the Central Government, and it is important that a check should be kept on the way in which they deal with these resources.

1. Ordinary Remedies for Protection of Trust Funds.—

To some extent the ordinary law provides machinery for protecting these funds from improper or unauthorised application, for it has long been decided that they are held upon charitable trusts for the public purposes declared by the statutes which regulate local authorities' financial transactions (*a*). Moreover the provision in these statutes of special procedure for questioning expenditure out of those funds does not exclude resort being had to the ordinary remedies available for the protection of all property held on charitable trusts, and so the Attorney-General may take proceedings to protect them. Nor is this protection limited to proceedings brought against the local authority itself. Any person who deals with these funds in a manner unauthorised by law and with notice of the trust is personally liable for breach of trust (*b*). Thus the Attorney-General may obtain an injunction against the local authority

(*a*) *A.-G. v. Aspinall* (1837) 2 My. & Cr. 613; 28 Digest 464, 766. Including their power to levy a rate: *A.-G. v. Lichfield Corporation* (1848) 11 Beav. 120; 38 Digest 588, 1196.

(*b*) *A.-G. v. Wilson* (1840) Cr. & Ph. 1; 13 Digest 419, 1391.

itself (c), or against individual members or officers (d) to restrain unauthorised expenditure, or he may take proceedings to recover sums improperly paid from the individuals making or authorising the payments, or even from the recipients taking with notice of the trusts (e).

To leave the ordinary remedies for the protection of funds held upon charitable trusts as the sole means of preventing illegal dealing with the funds of local authorities would, however, be unsatisfactory, and statutes have laid down financial regulations and provided additional remedies.

2. Financial Regulations.—The law providing for the orderly keeping of accounts by local authorities was previously scattered among several statutes (f). The Local Government Act of 1933 consolidated these provisions, but, except for minor amendments, it did not seek to create a new code uniform in its application to all local authorities. It is still necessary therefore to distinguish between the rules regulating the expenses of different authorities.

District Councils.—Each urban district council is required to set up a general rate fund, an account of which is to be kept and into which all receipts are to be carried and from which all payments are to be made (g). Each rural district council is similarly required to establish a general rate fund into which all receipts are to be paid and from which all liabilities are to be discharged; but the procedure as to the keeping of accounts is more complex than in urban districts. The expenses of rural district councils are divided into “general,” to which the whole of the district is required to contribute, and “special” expenses whose burden falls only on particular “contributory

(c) *A.-G. v. Newcastle-upon-Tyne Corporation and North-Eastern Ry. Co.* (1889) 23 Q.B.D. 492; 33 Digest 85, 550.

(d) *A.-G. v. De Winton* [1906] 2 Ch. 106; 328 Digest 368, 38.

(e) *A.-G. v. Wilson* (1840) Cr. & Ph. 1; 13 Digest 419, 1391.

(f) Mainly: Public Health Act, 1875, §§ 207 (borough and urban district councils) and 229 (rural district councils); Municipal Corporations Act, 1882, §§ 139-143 (borough councils); Local Government Act, 1888, §§ 68, 74 and 80 (county councils); Local Government Act, 1894, §§ 11, 19 (parish councils and meetings) and 29 (rural district councils).

(g) Local Government Act, 1933, § 188.

places " within the district (*h*). Hence, though all receipts and payments, whether in respect of general or special expenses, must pass through the general rate fund, the law requires two sets of accounts to be kept by a rural district council—a "general district account" covering general expenses, and a "special district account" dealing exclusively with receipts and payments relating to special expenses (*i*).

Rural Parishes.—No statutory provisions require parish councils or parish meetings to set up funds or to keep accounts in any particular form, but rules stringently limiting the financial dealings of those authorities are laid down. In a rural parish which has a parish council, the council is the paymaster both of itself and of the parish meeting, but the amount it may spend is limited to the proceeds of a fourpenny rate on the parish, unless the parish meeting allows it to spend to an amount equal to a rate of eightpence in the pound (*j*). Moreover the law requires that every cheque or order for the payment of money by a parish council must be signed by two members of the council (*k*). If there is no parish council, the parish meeting is financially restricted within the proceeds of an eightpenny rate, which must also be made to cover its expenses under the Parochial Adoptive Acts (*l*).

Boroughs.—Borough councils must maintain a general rate fund for the borough and accounts of this fund must be kept. All receipts, including the income derived from any landed property owned by the corporation, must be paid into the general rate fund by the treasurer and all payments must be made out of it by him (*m*). With certain specified excep-

(*h*) See above, p. 167, as to the distinction between "general" and "special" expenses.

(*i*) Local Government Act, 1933, §§ 190 and 191.

(*j*) The Minister of Health may allow a particular parish council to exceed even this limit. These limits do not include expenses under the Parochial Adoptive Acts, nor under Part VIII of the Public Health Act, 1936: *ibid.*, § 230—a change rendered necessary through the repeal of the Baths and Washhouses Acts, 1846 to 1925: see above, p. 48.

(*k*) Local Government Act, 1933, § 193.

(*l*) Again the Minister may raise the limit.

(*m*) Local Government Act, 1933, § 185.

tions (*n*), no payment may be made by the treasurer out of the general rate fund of a borough except under the authority of an order of the council signed by three members and countersigned by the town clerk. Nor is this all, the law further gives an interested person an opportunity to question the validity of such an order. A local government elector may inspect and take copies of an order for payment, and any person aggrieved by the order may appeal to the High Court, which may give such directions in the matter as they think proper. The decision of the High Court is, however, final (*o*).

County Councils.—The rules governing the expenses of county councils, though borrowed from those provisions relating to boroughs, are even more meticulous. County councils are the only authorities actually required by law to appoint finance committees. A county council, moreover, may incur no liability exceeding fifty pounds without first receiving an estimate from its finance committee (*p*). In addition a county council must make an annual budget: before the beginning of each financial year it must consider an estimate of its receipts and expenditure during the coming year, so that it may determine the amounts it will require to raise by precepts on the rating authorities within the administrative county (*q*). Though these statutory regulations only apply to county councils they are, in practice, closely copied by all classes of local authorities, their standing orders providing for some similar centralisation of financial problems in their finance committees.

Each county council is required to maintain a county fund into which all receipts are to be carried by the treasurer and from which all payments are to be made by him. But county councils, like rural district councils, have expenses in respect of both "general county purposes" and "special

(*n*) Such as, for instance, the remuneration of the mayor, recorder, clerk of the peace, or any other officer whose remuneration is payable by the council, or payments in pursuance of the specific requirement of a statute.

(*o*) Local Government Act, 1933, §§ 187 and 283. Formerly under the Municipal Corporations Act, 1882, § 141, the remedy was by removal of the order into the High Court by writ of *certiorari*.

(*p*) Local Government Act, 1933, § 86.

(*q*) *Ibid.*, § 182.

county purposes" (r). As the incidence of these charges is different, the law requires county councils to keep separate "general" and "special county accounts" (s). All payments into and out of the county fund must be made by the county treasurer. Payments out of the county fund (t) can only be made by the treasurer in pursuance of an order of the council, but the council can only resolve to make such an order on the recommendation of its finance committee. The order of the council must be signed by three members of the finance committee, present at the meeting of the council at which the order was made, and countersigned by the clerk. As in the case of borough councils an aggrieved person may appeal to the High Court against the validity of the order (u). As if all these safeguards against loose financial methods were not enough, the law expressly requires all cheques for payment of money drawn by the duly authorised officer in accordance with an order of the council to be countersigned either by the clerk or by some other person approved by the council (v).

3. Audit of Accounts.—These provisions generally secure some degree of regularity in the ordering of the financial transactions of a local authority ; indeed in the case of borough and county councils they even give an opportunity of questioning the legality of payments before they are made ; but they do not go far enough. Some further check is required and this check is provided by the audit required by law to be held of the accounts of local authorities and their officers. But the law on this matter is not uniform : largely as a result of historical causes there are still two systems of local government audit at work side by side and each is based on its own principle.

The Poor Law Amendment Act, 1834, by which the reforms

(r) See above, p. 165.

(s) Local Government Act, 1933, §§ 180 and 181.

(t) Save for some narrow exceptions—*e.g.* payments under the specific requirements of a statute.

(u) Formerly the appeal was by *certiorari* : Local Government Act, 1888, § 80.

(v) Local Government Act, 1933, § 184.

of the nineteenth century in local government were inaugurated, provided that payments made contrary to the provisions of the Poor Law Act or the Orders of the Poor Law Commissioners should be illegal, and introduced for the first time a compulsory annual audit conducted by auditors with powers to disallow illegal payments and to surcharge them upon the individuals responsible for making them. A further step was taken by the Poor Law Amendment Act of 1868, which transferred the appointment of these auditors from the boards of guardians to the Local Government Board. Finally, the District Auditors Act, 1879, reorganised the system which had grown up, and made the district auditors, as they were now called, officers of the Local Government Board, that is, civil servants. But though they are civil servants, the district auditors must not be thought of as mere agents of the Minister of Health. They occupy an independent position, and the duties cast upon them by the law require the exercise of their own discretion in a judicial spirit.

On the other hand, the Municipal Corporations Act, 1835, in reforming the boroughs, was content with a more confined system of audit, perhaps because the framers of that Act desired simply to prevent corruption and did not foresee the extensive use which future legislation would make of the municipal organisation. That Act provided only for amateur borough auditors, who, as representatives of the burgesses and of the council, would check the accounts of the corporation and its officers. Finally, the Local Government Act, 1933 (*w*), put it in the power of borough councils to supersede the borough auditors either by the district auditor or by professional auditors appointed by the council. But until a borough council takes steps to avail itself of this power the system of amateur borough auditors remains in force.

Two different principles were, therefore, respectively introduced by the legislation of 1834 (*x*) and 1835. On the one

(*w*) Re-enacting the Municipal Corporations (Audit) Act, 1933.

(*x*) Especially, of course, after the Act of 1868 had conferred the power of appointing auditors on the Central Department.

hand the system working through the district auditors presupposes that the financial activities of local authorities are matters in which the Central Government is concerned. On the other hand the system applied to municipal corporations regards the accounts of the local authorities, to which it applies, as solely the concern of the local ratepayers. With the growth of grants in aid the tendency has been to extend the first principle, even at the expense of the second, so that at the present day it is only some and not all of the accounts of borough councils which are still exempt from the scrutiny of the district auditor and are only checked by the borough auditors. As an illustration of this tendency we may note that the Local Government Act of 1929 (*y*), provided that the accounts of county borough councils, relating to the services which it transferred to them, should be audited by district auditors.

The Local Government Act, 1933, has confined itself to codifying the existing law, previously only to be discovered from a search through several statutes (*a*). It will be convenient, in the first place, to consider the more extensive system, that operated by district auditors, before passing to the system of borough audits.

(i) **The District Auditor.**—District auditors are appointed by the Minister of Health and are assigned by him to prescribed districts, into which the country is for this purpose divided (*b*). They are civil servants, and their salaries are paid by the State, though some recoupment towards their cost is obtained from the fees paid by the local authorities by means of stamps affixed to the financial statements certified by the auditors (*c*).

It may be said generally that at the present day all the accounts of all local authorities, excepting only some of the

(*y*) § 17. Now Poor Law Act, 1930, § 119. Of course this was only a continuation of the former practice while the poor law was administered by the guardians.

(*a*) These were (1) as to district audit: the District Auditors Act, 1879; the Public Health Act, 1875, §§ 245-247; the Local Authorities (Expenses) Act, 1887; the Audit (Local Authorities) Act, 1927; and (2) as to the borough audit: the Municipal Corporations Act, 1882, §§ 25-27; and the Municipal Corporations (Audit) Act, 1933.

(*b*) Local Government Act, 1933, § 220.

(*c*) *Ibid.*, §§ 221 and 222.

accounts of borough councils, come within the jurisdiction of the district auditor. Thus he audits the accounts of county councils, urban and rural district councils, parish councils and parish meetings, and of the committees and officers (*d*) of those authorities. Even in the case of boroughs he is not entirely excluded, for the accounts of joint committees to which members are appointed by any authority, whose general accounts are subject to district audit (*e*), and of some of the committees of county borough councils, come before him and not before the borough auditors (*f*).

Procedure in holding the Audit.—The accounts which are subject to audit by the district auditor are required to be made up yearly, the financial year ending on the thirty-first of March (*g*). But before the actual holding of an audit by a district auditor the law requires certain preliminaries to be observed, designed to give publicity to the proceedings and to enable any person interested to raise the question of the validity of any item appearing in the accounts. The first step is for the district auditor to make an appointment with the local authority concerned for holding the audit (*h*). The accounts to be audited, and all vouchers, must be deposited at the appropriate office of the council in question for seven days before the audit, and during that time all persons interested, who so desire, must be permitted to inspect and take copies of them (*i*). Moreover on receiving notice of the appointment the local authority must by advertisement in local newspapers

(*d*) Local Government Act, 1933, § 241. (*e*) *Ibid.*, § 219.

(*f*) *E.g.* Poor Law Act, 1930, § 119 (public assistance); Education Act, 1944, § 91 (education).

(*g*) The Minister of Health has power to vary this date: Local Government Act, 1933, § 223.

(*h*) The Minister of Health may at any time order the district auditor to hold an extraordinary audit. This may be held after only three days' written notice to the authority or person whose accounts are to be audited, and so the provisions as to preliminary steps must be modified: Local Government Act, 1933, § 236.

(*i*) A ratepayer may appoint a professional expert (not himself a ratepayer) to inspect on his behalf: *R. v. Bedwelty Urban District Council. Ex parte Price* [1934] 1 K.B. 333; Digest Supp. In the case of a joint board the ratepayers of the constituent authorities may inspect: *R. v. West Monmouthshire Omnibus Board. Ex parte Price* [1938] 1 All E.R. 220; 36 L.G.R. 156; Digest Supp.

give fourteen days' notice of the time and place at which the accounts and vouchers may be seen (*j*). When the time for holding the audit arrives, any local government elector for the area may appear before the district auditor and raise objections to any items appearing in the accounts (*k*). The auditor may by summons in writing require the production of all documents which he deems necessary (*l*).

Surcharge.—The district auditor's duty is, therefore, more than a mere checking of the accounts with the vouchers. He has quasi-judicial functions to perform ; he must surcharge any sum which has not duly been accounted for upon the person liable, and he must surcharge any loss upon the person whose negligence or misconduct caused it (*m*). But one of his most important duties is to discover and deal with illegal payments. It is not sufficient to show to him the resolution of the council under which a payment was made and the receipt given by the payee : he may, and indeed must inquire further and satisfy himself that the resolution itself was warranted by law (*n*). If he holds any payment to be illegal, he must disallow it. Obviously, however, in a great many cases it will be hopeless to attempt to recover from the recipient the sums illegally paid, and so the principle of surcharging has also been adopted here. This means that, if the district auditor disallows a payment, he must surcharge the amount involved upon the persons incurring or authorising it contrary to the law, and they then become liable to pay that amount to the authority concerned (*o*). Thus, if by a resolution of the council a sum

(*j*) Local Government Act, 1933, § 224. Rural parishes need not advertise in the local press ; they are required to give fourteen days' public notice instead : *ibid.*, §§ 287 and 288.

(*k*) *Ibid.*, § 226.

(*l*) *Ibid.*, § 225.

(*m*) Including any loss of interest or charge of interest caused by a failure to make, or collect rates or other revenue, or to issue a precept, arising through wilful neglect or wilful default.

(*n*) Thus a payment made to an officer in respect of extra work retrospectively, and not in pursuance of any prior agreement, is made without consideration and so is a mere gift. As local authorities have no general power to make gifts, such a payment is illegal : *Re Magrath* [1934] 2 K.B. 415 ; Digest Supp.

(*o*) Local Government Act, 1933, § 228. See also *Re Hurle-Hobbs* [1944] 1 All E.R. 249.

is paid illegally, the district auditor disallows it by striking it out of the accounts. This automatically prevents the accounts from balancing, because the local authority, having actually paid away the money involved, will be short by that amount. To restore the balance the auditor surcharges the sum upon the individual councillors who voted for the illegal resolution under which the payment was made, and they are required to refund the money to the local authority out of their own private resources. One curious limitation upon this power of disallowance and surcharge must, however, be noticed. Any expenditure of a local authority, which has been sanctioned by the Minister of Health, cannot be disallowed, and consequently no surcharge in respect of it can be made by the district auditor (*p*). The value of this provision is perhaps on the whole uncertain. It would be admirable in so far as it enabled local authorities in cases of doubt to obtain beforehand an authoritative ruling on the legality of proposed expenditure ; but this it does not do : the Minister's sanction excludes the district auditor's power to disallow, but does not necessarily make the payment lawful. If an interested party is prepared to put himself to the trouble and expense of challenging the payment in the courts, the Minister's sanction will be no defence (*q*). This provision gives to the Minister a wide dispensing power which is, however, only effective to take away the ratepayer's more easy method of controlling the financial activities of his local authority, and still leaves him free to avail himself of the assistance of the courts. At the same time it encourages a form of indirect central control by inducing local authorities to ask for the Minister's sanction before undertaking many forms of expenditure.

Any person, aggrieved by a disallowance or surcharge or by the auditor's decision on an objection made by that person, may require the auditor to state his reasons in writing (*r*).

(*p*) Local Government Act, 1933, § 228.

(*q*) *R. v. Grain, Ex parte Wandsworth Guardians* [1927] 2 K.B. 205 ; 37 Digest 219, 134.

(*r*) Local Government Act, 1933, § 226.

When the audit is completed the auditor certifies the accounts and within fourteen days sends a report on the audit to the local authority concerned (s).

Appeal from the District Auditor.—The district auditor's work is then completed, but from his decisions on any disputed items there may be appeals. The right to appeal is given both to a person who is aggrieved by a disallowance or surcharge, and to any person who appeared before the auditor to challenge any item and is disappointed by the decision upon his objection. Each of these parties may appeal, in some cases to the High Court and in others to the Minister of Health (t).

Formerly a person aggrieved could either apply to the King's Bench Division for a writ of *certiorari* (u) to remove the auditor's decision into the Court for review, or appeal to the Minister (v). In the former case the proceedings amounted to an appeal to the High Court from the auditor's decision, narrowly confined to its legal validity. An appeal to the Minister was not, however, so limited; the Minister was empowered to determine the appeal "according to the merits of the case," and could, even if he found the payment to be illegal, direct the resulting surcharge to be remitted where he thought that such a course was "fair and equitable"—a power in the exercise of which he could not be controlled by the courts, though his direction to remit a surcharge did not make the payment *ex post facto* lawful (w).

This system was, however, altered by the Audit (Local Authorities) Act, 1927 (x), which at once limited the powers

(s) Local Government Act, 1933, §§ 227 and 228. Except in the case of parish councils and meetings and joint committees appointed by them, when the report is to be sent to the Minister of Health.

(t) Local Government Act, 1933, § 229. Persons who appeared before the auditor and successfully challenged a payment may appear on an appeal in order to uphold their contention: *Re Magrath* [1934] 2 K.B. 415; Digest Supp.

(u) See below, p. 392.

(v) Under the Public Health Act, 1875, § 247; the Poor Law Amendment Act, 1844; and the Poor Law Audit Act, 1848.

(w) *A.-G. v. Merthyr Tydfil Union* [1900] 1 Ch. 516, p. 546; 30 Digest 152, 251.

(x) Re-enacted in the Local Government Act, 1933, §§ 229-231.

previously vested in the Minister and extended those of the Court. If the auditor's decision which is challenged relates to an amount exceeding five hundred pounds, the appeal lies only to the High Court, while in other cases the appellant is given the choice of either the High Court or the Minister of Health as the tribunal to which he may go. Moreover, greater uniformity in the principles to be applied in either case is ensured, for, even if the appeal is taken to the Minister, the strictly legal character of the proceedings is insisted upon by the provision that the Minister at any stage may, and, if the High Court so directs, must state in the form of a special case for the opinion of the Court any question of law arising in the course of the appeal (y).

In exercising this jurisdiction the Court or the Minister may alter the decision, not only when it is wrong in law or when it is unsupported by evidence, but also when it is clearly wrong in fact. The district auditor is solely concerned with the legality or illegality of payments; he has no right to control the policy of local authorities, and he may only check items of administration within the limits of the policy so determined upon. He must not substitute his judgment of what is desirable or necessary for that of the popularly elected council. But in practice it is difficult to draw the line between the respective spheres of policy and administration (z). As an example we may take the famous Poplar Case—*Roberts v. Hopwood* (a). There the Poplar Metropolitan Borough Council, being empowered to engage employees and to pay them the wages it deemed reasonable, resolved to pay to each of its lowest grade male and female workers a minimum wage of four pounds a week, which far exceeded the wages paid to similar classes of labour by other employers in the neighbourhood. The district auditor disallowed a large part of these payments, holding that wages slightly above the current rate might be proper, but that the excess over this amount could only be regarded as a gratuity

(y) Local Government Act, 1933, § 229.

(z) See *R. v. Roberts* [1908] 1 K.B. 407; 33 Digest 40, 217.

(a) [1925] A.C. 578; 33 Digest 20, 83.

paid by the council without any legal authority. This decision was upheld by the House of Lords on the ground that the council, being in effect a trustee of the ratepayers' money, must act in a fiduciary manner, and therefore, though it was lawful for it to pay wages, the expenditure on that head might be so excessive as to be unlawful (*b*).

Remission of Surcharge.—The power to strain the quality of mercy by remitting a surcharge, which was formerly the prerogative of the Minister alone, is now in a modified form also exercisable by the Court, and the necessity of an appeal against the auditor's decision as a condition precedent to its exercise is no longer insisted upon. A person who is surcharged may apply to the Court or the Minister (*c*) for a declaration that "in relation to the subject matter of the surcharge he acted reasonably or in the belief that his action was authorised by law." If he is successful in obtaining this declaration, the Court or the Minister, as the case may be, if further satisfied that he "ought fairly to be excused," may relieve him wholly or partly from personal liability in respect of the surcharge (*d*).

The amount surcharged upon a person, unless successfully appealed from or remitted by the Court or the Minister, is payable within fourteen days, and in default of payment the local authority to whom it is due may recover it by means of a distress warrant issued by the justices, followed by the sale of the seized property (*e*).

Disqualification produced by Surcharge in a Sum exceeding Five Hundred Pounds.—Before leaving the

(*b*) But the payment to an authority's employees of children's allowances has been held to be within the powers of the authority provided the total amount of the remuneration is fair and reasonable: *Re Walker's Decision* [1944] K.B. 644; [1944] 1 All E.R. 614.

(*c*) If he also appeals against the auditor's decision the application is made to the tribunal before which the appeal comes; if he does not appeal he may apply to the tribunal to which he might have appealed.

(*d*) Local Government Act, 1933, § 230. Cf. the Trustee Act, 1925, § 61. In *Re Magrath* [1934] 2 K.B. 415; Digest Supp., councillors were relieved in respect of an *ultra vires* payment to an officer for extra work.

(*e*) Local Government Act, 1933, §§ 232 and 233.

question of surcharges made by the district auditor, we must notice that in some cases they operate to produce a disqualification upon the person surcharged. A person surcharged by a district auditor for a sum exceeding five hundred pounds is disqualified from being a member of any local authority for a period of five years (*f*). But methods of escaping from this disqualification are provided. In the first place the person concerned is relieved from the disability, if on appeal, either to the High Court or to the Minister, the surcharge is itself quashed or reduced in amount to five hundred pounds or less (*g*). Secondly, whether he appeals or not, if he applies to the High Court or to the Minister and is successful in obtaining the declaration already mentioned, that he acted reasonably or in the belief that his action was authorised by law, the disqualification is then removed (*h*).

(ii) **Borough Auditors.**—Except where statutes regulating particular services have otherwise provided, or where councils have availed themselves of the power to supersede the borough auditors, the accounts of borough councils are exempt from the scrutiny of the district auditor, and are still governed by the system first introduced by the Act of 1835.

Practically this exemption means that the accounts of borough councils, other than those relating to education, public assistance, etc. (*i*), are submitted to borough, and not district auditors. These accounts are required to be made up yearly to the thirty-first of March, or to such other date as the

(*f*) Local Government Act, 1933, § 59. This disqualification was introduced by the Act of 1927 to meet a defect in the earlier procedure, which had been disclosed particularly in connection with the audits of the accounts of the Metropolitan Borough Council of Poplar. When members of local authorities were personally too poor to be able to meet the amounts surcharged upon them, it was found that they could in effect defy the auditor and continue to authorise illegal payments in spite of continued surcharges.

(*g*) Local Government Act, 1933, § 229.

(*h*) *Ibid.*, § 230.

(*i*) Education Act, 1944, § 91; Poor Law Act, 1930, § 119. The district auditor also audits the housing and road accounts of borough councils as a condition of the payment of Government grants; but in these cases he has no power of disallowance and surcharge.

council, with the consent of the Minister of Health, may determine. As soon as completed, they are to be submitted together with vouchers to the borough auditors (*j*).

In each borough in which the system still obtains there are three borough auditors, two of whom are "elective auditors." These latter must be persons who, while not being members of the council nor officers of the council, are qualified for election as councillors. They are annually elected by the local government electors of the borough. The third auditor is known as the "mayor's auditor," and is appointed each year by the mayor from among the members of the council (*k*).

It has been judicially stated that the duty of borough auditors is not merely to see if the vouchers appear regular, but to go further and examine them to see that payments are not illegal and improper, and if they find such payments to have been made, then it is their further duty to make the fact public by report to the council and the burgesses (*l*). But it must be recognised that this duty is one of "imperfect obligation." No power resides anywhere to compel the adoption of such a conscientious course, and the audit conducted by the borough auditors is not conclusive so as to prevent further action being taken in the courts (*m*).

Abstract of Accounts.—After the audit is complete the borough treasurer is required to print an abstract of the accounts, which is to be open to the inspection of any local government elector of the area (*n*).

Alternative to Borough Auditors.—The borough audit is in fact generally ineffective. The auditors are amateurs; there is no provision, comparable to that applying to the audit conducted by a district auditor, for the local government

(*j*) Local Government Act, 1933, § 240.

(*k*) *Ibid.*, §§ 237 and 238.

(*l*) *Thomas v. Devonport Corporation* [1900] 1 Q.B. 16, p. 21; 33 Digest 90, 597.

(*m*) *A.-G. v. de Winton* [1906] 2 Ch. 106, p. 119; 33 Digest 77, 497.

(*n*) Local Government Act, 1933, §§ 240 and 283.

electors to appear and contest items in the accounts, and the borough auditors in any case have no power to surcharge. Hence the audit conducted by them is rarely anything more than a mechanical comparison of entries and vouchers, and most boroughs, in addition to this statutory audit, have for some time employed professional auditors to examine their accounts. The recognition of the inefficiency of the borough audit at last led to an opportunity being given to borough councils to provide themselves with a system of audit more adequate to the complicated accounts which the expansion of local government services has brought into existence. Briefly the effect of the Municipal Corporations (Audit) Act, 1933, re-enacted in the Local Government Act, 1933 (*o*), is to enable borough councils to replace the borough auditors either by the district auditor or by a professional auditor.

Formalities.—In order to exercise this power a borough council must observe certain formalities. A meeting of the council must be specially held, after one month's notice, specifying the purpose of the meeting, has been sent to every member of the council. At that meeting a resolution to adopt either the system of district audit or the system of professional audit must be carried by not less than two-thirds of the members voting. An interval of at least one month must then elapse, and after this period the special resolution must be confirmed at an ordinary meeting of the council.

(i) **District Audit.**—The effect of following this procedure is to abolish the borough auditors of the borough in question and to substitute for them either the district auditor or a professional auditor. If the council has chosen the first alternative, all the accounts of the borough come under the jurisdiction of the district auditor, with the result that the provisions as to audit, disallowances, surcharge, appeals, etc., already discussed, come into operation (*p*).

(ii) **Professional Audit.**—On the other hand, if the borough council adopts the system of professional audit it must choose its auditor. The appointment must be made in writing under the seal of the corporation, the auditor chosen being a member of one of the professional bodies set out in the Act. The period during which the appointment is to continue and the amount of the remuneration are left to the discretion of the council. The professional auditor is expressly given the right to require from any officer of the corporation such books, etc., and such information as he may need in the performance of his duties. He is further required to add to his certificate any observations or recommendations which he thinks necessary or expedient.

The professional auditor supersedes the borough auditors only. Where a borough adopts the system of professional audit it does not thereby exclude the district auditor's jurisdiction over those of its accounts which are required by statute to be submitted to him. Moreover the professional auditor is given no power to disallow or to surcharge: he simply steps into the shoes of the borough auditors, with the further result that the rules, as to the date for making up the accounts and the printing of an abstract of accounts by the borough treasurer, remain unchanged (*q*). On the other hand, where the system of district audit is adopted by a borough council, these latter provisions cease to apply and everything connected with the accounts and audit falls to be determined in accordance with the law applicable to authorities whose accounts are required to be submitted to the district auditor (*r*).

4. Local Financial Returns.—As a final safeguard to prevent improper financial activities on the part of local authorities, and also as a means of securing the material from which valuable statistics may be constructed, the law has long

(*q*) Local Government Act, 1933, § 240.

(*r*) The opinion has been expressed, though there is as yet no authoritative decision, that once a borough council has exercised this power of adopting either district or professional audit, it cannot revoke its decision and revert to borough audit, nor can it have second thoughts and change over from district audit to professional audit or *vice versa*.

required annual returns of income and expenditure to be furnished to the Minister of Health. Formerly the provisions imposing this obligation upon local authorities were contained in two separate codes, one governing borough and county councils (*s*) and the other applying to all other local authorities, including parish meetings (*t*). As the substance of these two codes was almost identical, the Local Government Act, 1933, consolidated this branch of the law into one uniform body of rules applying to all authorities (*u*).

(*s*) Municipal Corporations Act, 1882, § 28; Local Government Act, 1888, § 75.

(*t*) Local Taxation Returns Acts, 1860 and 1877.

(*u*) Local Government Act, 1933, §§ 244-248.

CHAPTER VIII

BYE-LAWS

Legislative Powers of Local Authorities.—Local government inevitably involves a degree of regulation of individual conduct, and for a long time local authorities have had conferred upon them narrow legislative powers to enable them to perform this part of their task. There is no inherent power of legislation reposing in any local authority. Parliament in this field enjoys a monopoly. Hence the legislative powers of local authorities must be subordinate and must be derived from statute, by which alone Parliament can delegate these powers.

1. Standing Orders.—Two legislative powers are given to local authorities. First, they are granted powers to make their own standing orders, which prescribe the rules to be observed in the conduct of their business in council and committee, the relation between the council and its committees, and the performance of their duties by officers (*a*).

These standing orders, as has already been seen (*b*), are of importance in ensuring the smooth working of local authorities, but, because they deal only with internal affairs and do not directly affect anybody but the members and officers of the local authorities which make them, they are productive of no

(*a*) Local Government Act, 1933, 3rd Schd., Part V, para. 4. The Act gives express power to make standing orders (1) governing the quorum, proceedings and place of meeting of committees or joint committees, § 96 ; (2) providing for the temporary exclusion of a member disabled from taking part in a discussion through interest in a contract or other matter, §§ 76 and 95 ; (3) determining the time for holding meetings of county and borough councils, 3rd Schd., Part I, para. 1, and Part II, para. 1 ; (4) regulating the cases in which public notice of intended contracts shall be published or tenders invited, § 266. This last power is obligatory upon local authorities. (5) A parish council may make standing orders for regulating business and proceedings at parish meetings of the parish, 3rd Schd., Part VI, para. 7.

(*b*) See above, p. 138.

legal problems of any interest. They are linked rather with the practical working than the legal position of local authorities and are, perhaps, to be regarded as derived not from the exercise of true legislative powers, but rather from the right of any body effectively to govern its own proceedings.

2. Bye-laws.—The powers of local authorities to make bye-laws are, at the present day, very different from their powers to set up their own standing orders. Bye-laws are a true form of subordinate legislation, in the form of a local law, affecting persons other than their makers alone, and being enforceable in the ordinary courts. It has been held that the right of making bye-laws is inherent in a corporation (*b*), but it seems that this power only enables the making of rules governing the members of the corporation and its officers and servants and accordingly that the bye-laws referred to are more in the nature of standing orders than of what is meant by the term in modern local government law (*c*). Again power to make bye-laws binding on strangers to some extent, at any rate, might be conferred by charter (*d*), but in modern times all powers to make bye-laws rest upon statute. A modern definition was given by Lord Russell of Killowen C.J. in the case of *Kruse v. Johnson* (*e*): he said,

“A bye-law . . . I take to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. . . . Further, it involves this consequence—that, if validly made, it has the force of law within the sphere of its legitimate operation.”

This definition is rather too wide, for it would embrace within the term “bye-laws” some of the delegated legislation issuing from Government Departments; for our present purpose, it

(*b*) *City of London v. Wood* (1701) 12 Mod. Rep. 669; 13 Digest 325, 604.

(*c*) *Dodwell v. Oxford University* (1680) 2 Vent. 33; 13 Digest 326, 618.

(*d*) *Butchers' Co. v. Morey* (1790) 1 Hy. Bl. 370; 13 Digest 326, 620.

(*e*) [1898] 2 Q.B. 91, p. 96; 13 Digest 326, 631.

must, therefore, be limited to such ordinances when made by *local* authorities ; though it must be remembered that some other bodies—as, for instance, railway companies—have powers of making bye-laws. As so amended, it is clear from this definition that bye-laws are local laws affecting all persons within the area of their operation and enforceable in the courts by the imposition of a penalty ; that a power to make them must be derived from statute ; but that the ordinary courts retain the right to review bye-laws and to determine whether or not they have been validly made.

Powers to make Bye-laws.—Since the power to make bye-laws must be granted by Act of Parliament, we must first consider to what extent such powers have been given to local authorities.

Former Procedure : (i) “ Good rule and government ” Bye-laws.—Formerly it was necessary to distinguish no less than three different classes of these powers. In the first place the councils of boroughs and counties were empowered to make bye-laws “ for the good rule and government ” of their respective areas (*f*). Such bye-laws did not require direct confirmation by the Central Government, but a copy was required to be sent to the Home Secretary, and within a period of forty days an Order in Council might further suspend their operation or might totally annul them.

(ii) Sanitary Bye-laws.—Secondly, borough and county councils were empowered to make bye-laws for “ the prevention and suppression of nuisances ” within their areas, and the councils of boroughs and urban and rural districts were given powers to make bye-laws relating to sanitary matters (*g*), the procedure in each of these cases being the same (*h*). Bye-laws

(*f*) Municipal Corporations Act, 1882, § 23 ; Local Government Act, 1888, § 16.

(*g*) *E.g.* Public Health Act, 1875, §§ 80 (common lodging-houses) and 157 (new buildings).

(*h*) Municipal Corporations Act, 1882, § 23 ; Local Government Act, 1888, § 16 ; Public Health Act, 1875, §§ 182–187.

within this second class did not come into force until they had received the confirmation of the Minister of Health, so that a positive control was given to the Central Government.

(iii) Other Bye-laws.—In the third place, almost every statute setting up or regulating a particular service authorised the local authorities it employed to make bye-laws for the purpose of rendering that service effective. It is impossible to deal succinctly with this class of bye-law making powers. Sometimes the Act in question incorporated or applied the provisions of the Public Health Act of 1875 or of the Municipal Corporations Act, as to the bye-laws it authorised ; in other cases a special procedure was marked out.

Present Uniform Code.—The Local Government Act of 1933 sought to provide a uniform code, so far as such a thing is possible in the circumstances. The draftsman in general preferred to copy the principles embodied in the Public Health Act of 1875 rather than those to which expression was given in the Municipal Corporations Act. But he still preserved the distinction between the provinces of the Home Secretary and the Minister of Health. He attempted to reduce powers to make bye-laws conferred by old local Acts to some degree of uniformity as regards the procedure to be followed in their making. He also attempted to make this code applicable to powers of making bye-laws conferred by Acts dealing with particular services, which incorporate or apply the provisions previously contained in either the Public Health Act, 1875, or the Municipal Corporations Act, and to make it available for application to any new powers of making bye-laws which might thereafter be conferred (*i*). With so many contingencies to provide for it is not to be wondered at that the law is somewhat complex.

County councils and borough councils still retain express power to make bye-laws “ for the good rule and government ” of their respective areas and “ for the prevention and suppres-

(*i*) Local Government Act, 1933, § 250.

sion of nuisances therein " (*j*). Powers to make other bye-laws must be found in the Acts dealing with particular services.

The procedure prescribed in the Act of 1933 for the making and confirming of bye-laws applies in five classes of cases :

- (i) to bye-laws made by county councils and borough councils " for good rule and government " and " for the prevention and suppression of nuisances,"
- (ii) to bye-laws made under the Public Health Acts (*k*),
- (iii) to bye-laws made under existing enactments which provide for the adopting of the procedure of either the Public Health Act, 1875, or the Municipal Corporations Act,
- (iv) to bye-laws made under any local Act passed before the coming into force of the Public Health Act, 1875, and relating to purposes for which bye-laws may be made under any of the Public Health Acts, and
- (v) to bye-laws made under any enactment passed after the coming into force of the Act of 1933 (*l*).

Bye-laws made under particular statutes which prescribe a special procedure are unaffected and still remain to be governed by their own provisions.

Making of Bye-laws.—The Act of 1933 requires that the bye-laws to which it applies shall be made under the common seal of the local authority. One month's notice of intention to apply for confirmation must be given in the local press and during that period a copy of the bye-laws must be open to

(*j*) Local Government Act, 1933, § 249. County council bye-laws made under this power are, of course, of no force within any borough.

(*k*) Except under the Public Health Acts Amendment Act, 1890, § 13, relating to bye-laws for the prevention of danger from telegraph wires, etc. Such bye-laws are to be submitted to the Board of Trade. It must be remembered that large parts of the Public Health Acts, 1875 to 1932, have been repealed and replaced by the Public Health Act, 1936, so that the powers to make bye-laws so dealt with will now fall into class (v) in the text.

(*l*) *E.g.* Public Health Act, 1936, Housing Act, 1936, § 6.

public inspection at the offices of the authority (*m*). The bye-laws may then be submitted for confirmation, and are of no force until they are confirmed (*n*). In this latter respect an important change was made in the law relating to bye-laws "for good rule and government" (*o*).

Confirmation of Bye-laws.—To whom any particular bye-law is to be submitted for confirmation varies, and can best be explained by a further resort to tabulation.

(i) Bye-laws made by county councils and borough councils "for good rule and government" and "for the prevention and suppression of nuisances" are *prima facie* to be confirmed by the Home Secretary. But the debatable ground between "nuisances" and public health has been dealt with by providing that bye-laws of this class are to be submitted to the Minister of Health for confirmation instead of the Home Secretary, if they relate either to public health or to any other matter which, in the opinion of the Home Secretary and the Minister, concerns the Minister rather than the Home Secretary. In other words, in cases of doubt the two Ministers are left to decide which of them shall exercise the power of confirming or rejecting (*p*).

(ii) Bye-laws made under existing enactments, which incorporate or apply the provisions formerly applicable to bye-laws relating to "good rule and government" and "nuisances," are to be con-

(*m*) The Public Health Act, 1936, in respect of building bye-laws (§ 61), and offensive trades (§ 108) and the Water Act, 1945, in respect of bye-laws for the prevention of waste of water (§ 17) require in addition that one month's notice must be given in the London Gazette. The Public Health (Drainage of Trade Premises) Act, 1937, § 5 and Schd. requires still further formalities to be observed in the making of the trade effluent bye-laws it authorises.

(*n*) Bye-laws come into force either on the date fixed by the "confirming authority" or, if no date is so fixed, at the end of one month after confirmation.

(*o*) Local Government Act, 1933, § 250.

(*p*) *Ibid.*, § 249. The validity of a bye-law cannot be questioned on the ground that the wrong confirming authority has acted.

firmed either by the Home Secretary or by the Minister of Health, whichever would be the confirming authority had they been made under the provisions of the Act of 1933 itself (*q*).

- (iii) Bye-laws made under the Public Health Acts 1875 to 1932 are still to be confirmed by the Minister of Health.
- (iv) In all other cases to which the procedure of the Act of 1933 applies, the "confirming authority" is to be the person or authority specified in the particular enactment or in the provisions applied by it. If, for instance, an Act incorporates the provisions of the Public Health Act, 1875, the Minister of Health will be the person to whom the bye-laws made under it must be submitted for confirmation (*r*); while in the case of Acts passed since the Act of 1933 it is usual to find a section briefly stating that a certain Minister is the confirming authority for bye-laws made thereunder (*s*).

"Model" Bye-laws.—It might be thought that the existence of the many powers of making bye-laws possessed by local authorities would lead to the introduction of a state of great confusion, by reason of the fact that each local government area would be subject to a set of local rules having the force of law within it and bearing no relation to the systems existing even in neighbouring areas. In fact, however, a great degree of uniformity is obtained, and this without any sacrifice of elasticity. Bye-laws, before coming into force, must pass through a stage in which the Central Government is given an opportunity of confirming or rejecting them. The problems with which local government has to deal are much the same in similar areas throughout the country, and are in general susceptible of the same solutions. Hence the central administrative control, which exists over the making of bye-laws, is

(*q*) Local Government Act, 1933, § 250.

(*r*) *Ibid.*

(*s*) *E.g.* Public Health Act, 1936, § 312; Housing Act, 1936, § 6.

employed to obtain uniformity in all cases in which special circumstances do not justify departure from the general plan. Absurd or totally unnecessary bye-laws would never obtain confirmation. But in addition to this negative method, the Central Departments, which exercise control over the making of bye-laws, have adopted the practice of drawing up and issuing to local authorities sets of "model bye-laws." There can be no compulsion upon local authorities to adopt the "model" forms, but indirectly their adoption is assured, for a local authority wishing to make a bye-law may be sure that it will have to justify, by showing the existence of exceptional circumstances, any departure from a "model" form *in pari materia*, while the adoption of a "model" bye-law will secure for it the certainty that the Department will confirm it. Nor is this all : model bye-laws, except where they are issued in respect of some newly given power, are based on experience gained in different parts of the country, and sometimes even the validity of their provisions has been tested in the courts. It will be clear, therefore, in such cases that their clauses can be made effective in actual operation.

Validity of Bye-laws.—Bye-laws, even when they have passed through the procedure prescribed for their making and have received the positive approval of the particular Central Department concerned, are not necessarily valid. The procedure and confirmation, required by the Acts giving power to local authorities to make bye-laws, may be regarded as amounting merely to the process of enactment, and, even when this is completed, the resulting bye-law is still only legally a piece of subordinate legislation, and is therefore subject to that further control of the courts which characterises all subordinate legislation (*t*). The statutes giving powers to make bye-laws authorise the imposition of a penalty usually not exceeding five pounds for their infringement, and provide that this penalty shall be recoverable in a summary manner (*u*). If a

(*t*) See below, p. 321.

(*u*) *I.e.* before justices in petty sessions, Local Government Act, 1933, § 251.

person is prosecuted for breach of a bye-law, he may always set up that the bye-law is itself invalid, and this, not only because it has not in point of procedure and confirmation been regularly and properly made (*v*), but also because it is *ultra vires*.

The Judicial Tests.—The courts have developed a set of stringent rules for determining the validity of bye-laws. To be good they must, in addition to having been made regularly so far as the procedure prescribed by statute is concerned, also satisfy four judicial tests. In the first place, a bye-law must not be wider in its scope than the statutory power under which it is made : in the narrow sense of that term it must not be *ultra vires*. For instance, a bye-law prohibiting the alteration of existing buildings in new streets cannot be justified as having been made under a power to make bye-laws dealing with the level, width and construction of new streets (*w*). Secondly, a bye-law must be certain in its terms, so that a person subject to it can know that it refers to him and what it is that it requires him to do or to refrain from doing. Thus a bye-law for “good rule and government,” which provided that, “No person shall wilfully annoy passengers in the streets,” has been held to be too uncertain and, therefore, void (*x*). Thirdly, bye-laws must be repugnant neither to the Common nor Statute Law. This requirement may at first sight appear to be impossible ever of fulfilment, since every bye-law must involve at least the restriction of that liberty of action which the Common Law leaves to every man ; but properly understood it is by no means absurd. All that it means is that bye-laws are limited to supplementing the ordinary law, and have no force in so far as they conflict with its positive provisions. Bye-laws may properly limit the freedom of action which the law tacitly leaves untouched, but they cannot assume to

(*v*) But a printed copy of a bye-law purporting to be made by the local authority and signed by its clerk is *prima facie* evidence that, as regards procedure, the bye-law was properly made and confirmed : Local Government Act, 1933, § 252.

(*w*) *Brown v. Holyhead Local Board of Health* (1862) 1 H. & C. 601 ; 38 Digest 194, 313.

(*x*) *Nash v. Finlay* (1901) 85 L.T. 682 ; 38 Digest 163, 89.

repeal or to alter the requirements of the general law in a matter in which it lays down rules to be observed. So it has been said,

“where an authority, or body of persons, have been given power to make bye-laws for the preventing of nuisances, they have also power to declare that particular things, if capable of being nuisances, are when done in their district nuisances. The very power which is given to them involves their having authority to say what, in particular places and under particular circumstances, shall be nuisances” (y).

Lastly, to be good a bye-law must be reasonable. This last test is undoubtedly vague, and is purposely kept so in order that the courts may retain an adequate method of controlling the exercise of powers to make bye-laws. The test of reasonableness is impossible to define positively, but it may be said that a bye-law is not to be held unreasonable merely because the particular judge, before whom the question comes, thinks that it goes beyond what is prudent or necessary in the circumstances. Moreover in this matter the bye-laws made by local authorities are in a better position than those made by other bodies such as railway companies, for the former are assumed to be reasonable until the contrary is shown, whereas in the latter case the burden of proving that they are reasonable lies upon the person supporting their validity (z). Where such a vague standard as that of reasonableness is in question it would merely be tedious to cite many illustrations of bye-laws which have been held to be, or not to be, reasonable, for no general principle could be extracted from the cases. Two instances may, however, be given. In *Arlidge v. Islington Corporation* (a), the defendant metropolitan borough council, acting under § 94 of the Public Health (London) Act, 1891 (b), which empowered them to make bye-laws “for the cleansing and limewashing at stated times” of houses let in lodgings,

(y) *Per* Channell J. in *Gentel v. Rapps* [1902] 1 K.B. 160, p. 165; 13 Digest 328, 653.

(z) *Kruse v. Johnson* [1898] 2 Q.B. 91; 13 Digest 326, 631.

(a) [1909] 2 K.B. 127; 38 Digest 164, 101.

(b) Now the Public Health (London) Act, 1936, § 155.

made a bye-law requiring landlords to cause every part of such premises to be cleansed in the month of April, May or June in every year. Speaking of this bye-law, Lord Alverstone C.J. said (c) :

“ An absolute duty is imposed on every landlord to cause the premises to be cleansed, and a penalty is imposed for breach of that duty, when the landlord may be quite unable to carry out the work without breaking a contract or committing a trespass. The bye-law is therefore unreasonable and bad.”

Similarly in *Parker v. Bournemouth Corporation* (d) a power to make bye-laws for regulating the selling or hawking of any article on a beach or foreshore was held to be unreasonably exercised by a bye-law providing that,

“ A person shall not on the said beach or foreshore sell or hawk or offer or expose for sale any article, commodity, or thing, except in pursuance of an agreement with the corporation,”

since it withdrew from the courts this very question of reasonableness, by making the corporation the sole judge of the reasonableness of any agreement it chose to make, and since it also travelled beyond the power by enabling any person to be prohibited altogether from selling.

When, however, a bye-law has been made in proper form, has been duly confirmed and is not open to attack on any of the grounds outlined above, its character as law within the limits of its operation is clear. This may be illustrated not only by the fact that proceedings for the recovery of the prescribed penalty or, in a proper case, for an injunction (e) may be brought in the event of its breach, but also by the settled rule that even the authority which made it has no power to dispense with its observance in any particular case (f).

This latter rule may, however, prove to be unsatisfactory,

(c) [1909] 2 K.B. 127, at pp. 134-135.

(d) (1902) 86 L.T. 449 ; 38 Digest 165, 107.

(e) See below, p. 382.

(f) *Yabbicom v. King* [1899] 1 Q.B. 444 ; 38 Digest 190, 286 ; *Wm. Bean & Sons, Ltd. v. Flaxton Rural District Council* [1929] 1 K.B. 450 ; Digest Supp.

and, subject to proper safeguards, a statutory exception has been introduced by the Public Health Act, 1936 (*g*). This exception applies to bye-laws under that Act for controlling buildings and for preventing waste or contamination of water. In these two cases where a local authority considers that the operation of a bye-law would be unreasonable in a particular case it may relax or dispense with compliance with the bye-law, provided that the consent of the Minister of Health is obtained. But the Public Health Act, 1936, has introduced a new principle, designed to keep some of the bye-laws it authorises to be made, from falling so out of touch with current needs that they might prove oppressive. In these cases bye-laws only remain in force for a period of ten years (*h*), so that the periodical re-consideration of its bye-laws by the local authority which made them is assured.

(*g*) §§ 63 and 132.

(*h*) Public Health Act, 1936, §§ 68 (building bye-laws), 108 (offensive trades), also Water Act, 1945, § 17 (water).

CHAPTER IX

GENERAL POWERS OF LOCAL AUTHORITIES

Local Authorities have no Autonomous Powers.—The Local Government Act, 1933, was not content to consolidate the provisions governing the constitution of local authorities: it also attempted to provide them with a general framework of powers. In so doing, however, it was necessary to preserve a fundamental principle of local government law, that local authorities are not autonomous bodies, able to act as they wish in any circumstances, but that they are, on the contrary, severely limited to the discharge of the duties and the exercise of the powers which Parliament has seen fit to confer upon them (*a*). In the past the application of this principle has led to unnecessary complexity in the arrangement and even the substance of the law. There are certain common classes of powers, such as the power to rate and to borrow, the power to make bye-laws and the power to acquire land, which are necessitated for the proper provision of many diverse local government services. Formerly the principle, that local authorities require statutory powers for every act that they may wish to perform, led inevitably to the inclusion, in every Act setting up or regulating a new service, of all those common powers, either together with full details of the procedure to be followed in each case, or with a clause incorporating similar provisions contained in other Acts. If the first course was adopted, the Act in question was complete in itself, though often the conditions to be observed and the procedure to be followed might differ greatly from the conditions and procedure

(*a*) See below, Ch. XII.

governing the exercise of similar powers conferred by other statutes in respect of other services. If the second course was adopted, a degree of uniformity in the exercise of those common powers was obtained, but only at the expense of the disadvantages inevitably arising from legislation by reference. Moreover the piecemeal nature of legislation *ad hoc* for each particular service often caused serious gaps in the law, one authority having a power to do some act which another authority was incapable of performing.

General Powers conferred by Act of 1933.—The way in which this defective state of the law might be remedied was clearly indicated by the Local Government Act, 1888, which provided the county councils it created with a general scheme of powers for use under whatever statute their activities were from time to time being carried on. This precedent was followed and generalised by the Local Government Act of 1933, which set up a framework of common powers to be employed in the performance of any service which a local authority is authorised or required by an Act of Parliament to undertake. But the conditions under which alone these general powers may be exercised must be clearly noted. The fundamental principle, that Parliament alone can enable local authorities to act, has been preserved : the general powers of the Act of 1933 can, therefore, only be utilised where a statute has expressly or by implication brought them into play. In this respect the Act of 1933 creates machinery, but it does not give to local authorities the power to set that machinery in motion : that power is reserved for Parliament. What the Act of 1933 secures is that there shall no longer be the necessity for constructing a complete set of general powers whenever a new service is introduced. An Act setting up a local government service has henceforth only to say in so many words, "Local authorities in carrying out their duties or exercising their powers under this Act are hereby empowered to incur expenses, to borrow, to make bye-laws and to acquire land," and automatically the code of procedure contained in the Act

of 1933 governing the exercise of the specified powers becomes available for the local authorities in question.

1. Acquisition of Land.—Some of these general powers have already been discussed, and it will suffice to refer to the general powers of rating or precepting for rates (*b*), borrowing (*c*) and making bye-laws (*d*). The other important power which requires more detailed treatment here is that relating to the acquisition and management of land.

The Act of 1933 does not, however, in this matter contain a complete code entirely superseding the provisions of all existing statutory powers. Some such powers are exceptional enough to be left as they stand, but the Act does enable a picture of the whole law to be quickly obtained, for it sets out in its Seventh Schedule a list of the statutes conferring special powers relating to the acquisition or management of land which are left untouched by its provisions (*e*).

The powers relating to the acquisition of land naturally fall into two halves, according as the acquisition is to be by agreement between the local authority and the landowner or is to be compulsory.

Acquisition of Land by Agreement.—The Act of 1933 deals first with the acquisition of land by agreement. It confers a general power upon all local authorities, including parish councils, to acquire by agreement any land for the purpose of any of their functions under a public general Act (*f*). This power may be exercised not only where the land to be acquired lies within the area of the local authority but also where it is situated outside that area, and the power covers an acquisition by way of purchase, or lease, or exchange (*g*). It

(*b*) See above, p. 163.

(*c*) See above, p. 190.

(*d*) See above, Ch. VIII.

(*e*) This list includes "any local Act." To this list must now be added the Air Navigation Act, 1936; and the Housing Act, 1936. But the Education Acts, 1921 to 1933, were deleted from the list by the Education Act, 1944, 9th Schd., Part I, so that the acquisition of land for the purposes of the Education Act, 1944, now comes under the general powers.

(*f*) For instance, under the Local Government Act, 1933, §§ 125 and 127, local authorities may acquire or provide buildings for offices and halls for the transaction of their business and for public meetings and assemblies.

(*g*) Local Government Act, 1933, §§ 157 and 167.

will be noticed that a local authority exercising this power to acquire land by agreement does not need to obtain the consent of any Central Department, though it must be remembered that, as it will almost inevitably need to borrow money if it wishes to make a purchase, Ministerial approval may indirectly have to be obtained. Local authorities may also acquire land by agreement for any purpose for which they are authorised by a public general Act to acquire land, although the land is not immediately needed for that purpose. The exercise by local authorities of this power to acquire land in advance of their requirements is, however, only permitted with the consent of the appropriate Central Department, which may also impose conditions. When land is acquired in advance of requirements it may be used temporarily by the local authority for any of its functions until it is needed for the purpose for which it was acquired (*h*).

Compulsory Acquisition of Land.—Compulsory acquisition is a more complicated matter than the acquisition of land by agreement. In the first place, a power to expropriate the owner must be conferred by statute. This the Local Government Act of 1933 does in varying measure so far as the different classes of local authorities are concerned. County councils are given a general power to acquire land compulsorily for the purpose of any of their functions under a public general Act (*i*). At the other extreme, parish councils, if they are unable to purchase by agreement and on reasonable terms land suitable “for any purpose for which they are authorised to acquire land,” may be empowered to purchase compulsorily (*j*). Thirdly, the councils of boroughs (other than county boroughs, whose powers are similar to those of a county council) and urban and rural districts are only given expressly a power to

(*h*) Local Government Act, 1933, § 158.

(*i*) *Ibid.*, § 159.

(*j*) Local Government Act, 1933, § 168. As they are expressly authorised to acquire land “for the purpose of any of their functions under this or any other public general Act” (§ 167) this seems to give them as wide a power of compulsory purchase as is conferred upon county councils. But it must be remembered that public general Acts do not give parish councils powers to acquire land as frequently as they confer such powers upon county councils, and the exercise by parish councils of the power is hedged about by conditions; see below, p. 235.

purchase land compulsorily "for any of the purposes of the Public Health Acts, 1875 to 1932" (*k*). All these powers are capable of exercise so as to enable land both within and without the area of the local authority in question to be acquired compulsorily. It must be remembered that in addition many other statutes dealing with particular services authorise the compulsory purchase of land. But these general powers of compulsory purchase must be read subject to a limitation. Where an enactment confers on a local authority power to acquire land for a particular purpose, but expressly restricts the power to an acquisition by agreement, the effect of the general powers contained in the Local Government Act, 1933, is not to overrule this limitation, and no compulsory purchase may be effected, unless indeed a specific power is obtained by private Bill procedure (*l*).

Procedure on Compulsory Purchase.—It would be dangerous to give these wide powers of expropriating the subject's landed property to the hundreds of local authorities scattered up and down the country, without at the same time providing some check to prevent their improper or unnecessary use. This check is provided by the procedure to be followed in exercising these powers of compulsory purchase. In every case where a general Act confers powers of compulsory purchase the consent of some Central Department at least is required, and this assumes such proportions that, though we have spoken of the powers of local authorities to purchase land compulsorily, it might have been better to follow the wording of the Local Government Act of 1933, which says instead that a local authority "may be authorised to purchase compulsorily" (*m*).

In consolidating the provisions relating to compulsory

(*k*) Local Government Act, 1933, § 159, amended by the Public Health Act, 1936, 3rd Schd., Part V. They are also given power to purchase land compulsorily for the provision of offices, § 125.

(*l*) Local Government Act, 1933, § 179. In practice large schemes of works require the promotion of a local Act, and direct powers of compulsory purchase of the necessary lands are usually included therein. But see now the very wide powers conferred by Part I of the Town and Country Planning Act, 1944, below, p. 550.

(*m*) *Ibid.*, § 159.

purchase found in the earlier law, the draftsman of the Act of 1933 was faced by three difficulties. In the first place, the position of parish councils has differed radically from that of other local authorities, parish councils having in this matter been put under the tutelage of the county council. In the second place, the practice of older legislation has been to require that land shall only be compulsorily purchased by means of a "provisional order" requiring express confirmation by Parliament before it becomes effective (*n*). More modern legislation has, however, simplified the procedure and resorted to a "compulsory purchase order" requiring only Ministerial confirmation without the necessity of an appeal to Parliament in every case. Thirdly, various enactments have required at least the consent of some Central Department other than the Minister of Health, who is the person usually concerned with compulsory purchase by local authorities. The draftsman of the Act of 1933 has accordingly found it desirable to provide three codes of procedure for compulsory purchase of land, two alternatives applying to all local authorities other than parish councils, and one applying only to parish councils, which must be dealt with separately ; but he has limited these codes so that they only apply to powers which involve the intervention of the Minister of Health. Where other Departments are empowered to authorise compulsory purchase the procedure prescribed by the Act of 1933 has no application (*o*).

Compulsory Purchase by Provisional Order.—First, the procedure by way of provisional order may be considered. This is inapplicable to parish councils, but may be utilised by any other local authority, which has power to purchase land compulsorily conferred upon it either by the Local Government Act of 1933 itself (*p*), or by any enactment in force before June, 1934, which incorporated or applied the provisions of the Public Health Act, 1875, § 176, or lastly by any enactment passed or statutory order made after May, 1934,

(*n*) *E.g.* Public Health Act, 1875, § 176, a provision frequently incorporated in other legislation. As to provisional orders, see below, p. 312.

(*o*) See 7th Schd.

(*p*) See above, p. 228.

which empowers the Minister of Health to authorise a compulsory purchase of land by provisional order (*q*). When this procedure is applicable the local authority must first publish a notice in the local press describing the land it desires to purchase and stating the purpose for which it is required. At the same time it must serve every owner, lessee and occupier (except a tenant for a month or any less period) of the land in question with a similar notice stating that application for a provisional order will be made to the Minister of Health, to whom objections may be made. When these preliminaries are completed the local authority may request the Minister to make a provisional order authorising the compulsory purchase of the land. If objections are made to the Minister (other than objections which relate only to matters capable of being dealt with when the question of compensation comes to be determined) the Minister must hold a local inquiry : but in other cases no local inquiry need be held. The Minister must then decide whether he will make the desired provisional order. If he does make the order, it must incorporate provisions dealing with the assessment of compensation and so forth. As the order is only provisional until it is confirmed by statute, a further opportunity is available for interested persons to oppose its confirmation by Parliament, and in order to secure the due appreciation of this right, the local authority is required to serve copies of the order on the persons affected (*r*).

Compulsory Purchase Orders.—The second form of procedure for the exercise of the powers of compulsory purchase, possessed by local authorities other than parish councils, is by a compulsory purchase order requiring no confirmation by Parliament. It is only available where power to proceed in this manner is conferred on a local authority, subject to the confirmation of the Minister of Health, by a public general Act passed after the commencement of the Local Government Act of 1933 (*s*). The first step is for the local authority to pre-

(*q*) *E.g.* Public Health Act, 1936, § 306.

(*r*) Local Government Act, 1933, §§ 160 and 285 and 6th Schd.

(*s*) *E.g.* Physical Training and Recreation Act, 1937, § 5.

pare the order, which must describe the land to which it applies by reference to a map, and which must contain provisions for compensation and so forth. The local authority must next publish a notice in the local press stating that the order has been made, describing the land and the purpose for which it is required and giving information of where the order and map may be inspected. Again, as in the case of a compulsory purchase by provisional order, the local authority must serve notices upon owners, lessees and occupiers of the land in question, stating the effect of the order and that it is about to be submitted to the Minister of Health for confirmation and that objections may be made to him. If objections, not relating exclusively to matters of compensation, are made to the Minister, he must hold a local inquiry, but in other cases he may directly decide whether or not to confirm the order. In confirming the order the Minister may make any modifications in its terms, except such as would include within its ambit additional land. If the order is confirmed by the Minister, the local authority must publish notice of its confirmation in the local press and must serve notices and copies of the order on the persons concerned. Only when this notice of confirmation is published does the order become operative (*t*).

Differences between Provisional Orders and Compulsory Purchase Orders.—A cursory glance at these two codes of procedure, governing the exercise of the power to purchase land compulsorily, might leave the impression that they are very much alike. In each case the local authority must first give certain notices, the Minister's approval must then be obtained, and lastly further notices must be given by the local authority. But important differences nevertheless exist. In the first place, a provisional order is made by the Minister, while a compulsory purchase order is made by the local authority. This means that the provisional order is an expression of the Minister's wishes, a compulsory purchase order an expression of the local authority's, which the Minister

can only modify within limits. Secondly, however, a provisional order does not become effective until Parliament has confirmed it and so given to it the force of an independent enactment; while a compulsory purchase order depends for its validity only upon confirmation by a member of the Executive Government. This difference is recognised in the Act. A compulsory purchase order which does not come under parliamentary scrutiny is incapable of authorising the compulsory purchase of the site of an ancient monument or other object of archæological interest, nor may it be utilised to obtain land from any other local authority or from persons authorised by any enactment to undertake the provision of transport, gas, electricity, water or other public utilities (*u*). Nor are these the only limitations which restrict the scope of compulsory purchase orders as compared with provisional orders. If it is desired to acquire land forming part of a common or open space or allotment, then, unless an equally advantageous piece of land is given in exchange, a compulsory purchase order merely confirmed by the Minister cannot authorise the acquisition: in such cases the compulsory purchase order is provisional only and must be confirmed by Parliament if it is to have effect (*v*).

These practical differences between the scope of provisional orders and compulsory purchase orders do not exhaust the legal implications arising from the methods by which they are respectively confirmed. There is a difference of profound importance. A provisional order when confirmed by statute becomes unassailable: its validity cannot be challenged (*w*). A compulsory purchase order, on the other hand, depends for its legal effect, not upon the direct expression of the wishes of Parliament, but upon the proper exercise of the statutory power under which it is made. Its force is derived from Parliament only, as it were, at second-hand, and the possibility of error or mistake as to the extent of the statutory power may have crept in. Its validity, therefore, may be challenged in

(*u*) Local Government Act, 1933, § 179.

(*v*) *Ibid.*, § 174.

(*w*) See below, p. 318.

the courts within a certain time and subject to certain conditions (x). A person aggrieved by a compulsory purchase order who desires to question its validity may apply to the High Court within two months from the date on which it became operative, and that Court is empowered to quash the order, either wholly or in so far as it affects the property of the applicant. But if the applicant attacks the validity of the order solely upon the ground that there has been a failure to comply with the procedure governing its making or confirmation, he must further prove that his interests have been substantially prejudiced thereby. On the other hand, if the order is alleged to be invalid for other reasons, as for instance because it was made in circumstances in which no statutory power to do so existed, the applicant can succeed without the necessity of proving prejudice to his interests (y).

The Public Works Facilities Act, 1930.—Before passing to consider the provisions of the Local Government Act of 1933 relating to compulsory acquisition on behalf of parish councils, we may notice briefly a convenient procedure frequently employed by local authorities for compulsory purchase. The Public Works Facilities Act, 1930, was originally passed as a temporary measure to expedite a programme of public works for the alleviation of unemployment. The Act as a whole has lapsed, but its provisions conferring powers of compulsory purchase on local authorities have been kept alive annually by Expiring Laws Continuance Acts. The Act provides a procedure by compulsory purchase order which may be used for the acquisition of land “for any purpose for which the local authority . . . could be authorised to acquire compulsorily the land . . . by an order having effect (either with or without approval by Parliament) under some enact-

(x) Except when it has been confirmed by Parliament, as is necessary where allotments, commons, or open-spaces are detrimentally affected: Local Government Act, 1933, § 174.

(y) Local Government Act, 1933, § 162. See further below, p. 323. Appeal lies to the Court of Appeal, but not to the House of Lords without the consent of the Court of Appeal.

ment in force immediately before the commencement " of the Act of 1930. Thus if a local authority is empowered by statute to acquire land compulsorily by either a provisional order or by a compulsory purchase order, it may instead avail itself of the procedure under the Public Works Facilities Act, 1930. The procedure and effects of a compulsory purchase order under the Public Works Facilities Act are very similar to those applicable to a compulsory purchase order under the Local Government Act of 1933 ; but there are three main differences. First, the Public Works Facilities Act provides for confirmation of the order by whatever Government Department is concerned with the functions of the local authority for which the purchase is made. Secondly, a person aggrieved by the order is only given twenty-one days, in place of the two months available under the Local Government Act, 1933, in which to apply to the High Court to challenge its validity. Lastly, when the order has become operative, the local authority may, under a special provision of the Public Works Facilities Act, obtain possession of the land expeditiously. After service of the notice to treat, which is the first step in carrying into actual effect any order authorising compulsory purchase, the local authority may give fourteen days' notice to the owner and occupier and thereupon enter and take possession of the land, leaving the question of compensation for subsequent settlement. This may well be a very valuable power.

Compulsory Purchase on behalf of Parish Councils.—

As has already been pointed out, the procedure governing the compulsory purchase of land by a parish council is more complicated than that applicable to other local authorities. The parish council desiring to purchase land compulsorily must put the circumstances before the county council, and the latter body, if satisfied that it is justified in proceeding with the matter, must hold a local inquiry after due notice. When the inquiry has been completed the county council must consider any objections received from persons interested, and may

then, if it thinks proper so to do, make a compulsory purchase order. The further procedure and the effect of the order when made and confirmed are identical with those already described in the case of other compulsory purchase orders under the Local Government Act, 1933, subject, however, to three exceptions. First, the county council need not publish the preliminary notice required in the case of ordinary compulsory purchase orders, since the objects of that notice—due publicity as to the land in question and the purpose for which it is required—are adequately obtained by the inquiry which the county council must hold before making the order. Secondly, if no objections are made to the Minister of Health, he is bound to confirm the order, though he may modify its provisions. Thirdly, the county council is required to carry the order into effect, though the land will be conveyed to the parish council. This procedure, in short, permits a parish council to make use of a compulsory purchase order, though it must obtain the order from the county council, which alone has power to make it. But this dependance upon the county council is tempered by a provision permitting the parish council to appeal direct to the Minister, if the county council refuses to make the order. When this course is taken the Minister, after holding a local inquiry, may make the order, which has the same effect as if it had been made by the county council and confirmed by the Minister (z).

2. Management and Disposition of Land.—The Local Government Act of 1933, in addition to the powers of acquiring land already mentioned, confers on local authorities general powers of managing and disposing of their land. Again, however, it is necessary to distinguish between three particular cases.

Corporate Land.—In the first place, the Act reproduces provisions taken from the Municipal Corporations Act, 1882, governing the “corporate land” of municipal corporations. As has been pointed out, some of the older municipalities still possess extensive estates which were acquired by them long

(z) Local Government Act, 1933, § 168.

before the modern system of local government came into existence, and "corporate land" is accordingly defined as "land belonging to, or held in trust for, or to be acquired by or held in trust for, a municipal corporation otherwise than for an express statutory purpose" (a). Simply in its character as the executive body of the wider, non-statutory municipal corporation, the council of a borough, which has no power under its charters to acquire land, is now permitted to acquire by agreement land to be held as corporate land with the consent of the Minister of Health, but only on such terms and conditions as he approves (b).

The property, now held by municipal corporations as corporate land, was frequently given originally either for the benefit of the freemen of the borough or of the inhabitants at large. Before the Municipal Corporations Act, 1835, freemen formed an integral part of the body corporate, but that Act deprived them of their peculiar membership of the corporation, while preserving their rights over corporate property (c). Such corporate land is therefore held by the corporation subject to the freemen's rights (d). The benefit of the borough as a whole, to which purpose other corporate property is devoted, is now obtained by transferring the rents and profits to the general rate fund of the borough, and so relieving *pro tanto* the rates of the area (e). Borough councils are empowered to lease corporate land for certain periods and purposes, and, if the consent of the Minister of Health is obtained, they may dispose of it by sale, exchange, mortgage and so forth (f).

Other Land.—So far as their land acquired for statutory purposes is concerned, borough councils are in no different position from that occupied by other land-owning local authorities. The law provides certain general powers exercis-

(a) Local Government Act, 1933, § 305.

(b) *Ibid.*, § 171.

(c) *Lincoln Corporation v. Holmes Common Overseers* (1867) L.R. 2 Q.B. 482; 33 Digest 50, 302.

(d) As to freemen, see now Local Government Act, 1933, §§ 259 to 265, which still preserve their rights.

(e) Local Government Act, 1933, § 185.

(f) *Ibid.*, § 172.

able by all local authorities except parish councils. Subject to certain exceptions, a local authority which has acquired land for one purpose may, with the consent of the Minister of Health, appropriate it to other purposes, so long as the latter are purposes for which the authority could have acquired new land (*g*). Again, with the consent of the Minister, a local authority may lease its land or sell or exchange it (*h*).

Parish Councils.—A parish council, or the representative body of the parish with the consent of the parish meeting, may let its land only with the consent of a Central Department, which may be the Charity Commissioners, the Ministry of Education, or the Minister of Health according to the purpose for which it is held (*i*). In order to sell or exchange its land a parish council, or the representative body of the parish, in addition to the approval of the appropriate Central Department, must obtain the consent of the parish meeting (*j*).

3. Power to accept Gifts.—Closely connected with the general powers of local authorities, relating to dealings with land, are the provisions of § 268 of the Local Government Act, 1933. That section confers on all local authorities a power to accept gifts of real or personal property for any public purpose or for the benefit of the inhabitants of the area of the particular authority in question, except property which is to be held in trust for any ecclesiastical or eleemosynary charity. This is a new provision. Formerly only parish councils had a general power to accept gifts (*k*), and this anomalous position, in which the smallest of authorities had a power not possessed by the larger ones, has now been terminated.

4. Conferences.—A further general power conferred on local authorities by the Local Government Act of 1933 may

(*g*) Local Government Act, 1933, §§ 163 and 179.

(*h*) *Ibid.*, §§ 164 and 165. The Minister's consent is not required for a lease not exceeding seven years.

(*i*) *Ibid.*, § 169. No consent is needed for a lease for not more than one year or for the purpose of allotments.

(*j*) *Ibid.*, § 170.

(*k*) Local Government Act, 1894, § 8. Under the Housing Act, 1936, § 150, there is a narrower power to accept gifts for housing purposes.

also be mentioned here. A local authority, other than a parish council, is empowered to pay reasonable expenses incurred by its members or officers in attending conferences or meetings, convened by local authorities or by an association of local authorities for the purpose of discussing matters connected with the functions of the authority (*l*). This power does not supersede any specific power to defray expenses of this nature conferred by any other Act: in these cases the conditions laid down in such other Act must be observed (*m*).

5. Travelling Expenses.—The Local Government Act 1933 (*n*), confers power on county councils to defray the expenses of their members in travelling to and from meetings of the council or of certain committees or in travelling by direction of the council or committee to carry out necessary inspections. The committees referred to are those exercising functions throughout the whole county, as opposed to a mere part of the county, and include sub-committees and joint committees, such as the standing joint committee, and joint boards. This power was extended by the Local Government (Members' Travelling Expenses) Act, 1937, to cover guardians committees, which act only in defined parts of the county (*o*). At the same time assessment committees, acting in an assessment area comprising two or more rating areas, were given a similar power of defraying members' travelling expenses. But these powers are strictly limited. In the first place, they are only conferred on county councils and certain assessment committees acting in administrative counties. Secondly, the powers are limited to expenses of travelling in the strict sense and do not extend to permit of the payment of subsistence allowances to members while travelling on council business (*p*).

(*l*) Local Government Act, 1933, § 267.

(*m*) See, *e.g.*, County Councils Association Expenses Acts, 1890 to 1937; Education Act, 1944, § 83.

(*n*) § 294.

(*o*) As to guardians committees, see below, p. 676.

(*p*) *Glamorgan County Council v. Ayton* [1936] 3 All E.R. 210; 155 L.T. 509; Digest Supp.

CHAPTER X

THE ADMINISTRATION OF JUSTICE

Relation of Local Government to the Administration of Justice.—It might seem to be entirely irrelevant to the subject-matter of this book to include in it a chapter dealing with the organisation throughout the country of the areas of jurisdiction of courts of law, and indeed no mention need be made of the Supreme Court and the modern County Courts. Assizes and quarter and petty sessions have, however, as a legacy from the past an intimate connection with the areas in which local government is carried on, and even at the present day the cost of upkeep of these courts is provided out of the funds of local authorities.

Historical Connection.—In former times the divisions of the country for local government purposes were utilised for defining the territorial limits of judicial jurisdiction, and this is not surprising when it is remembered that local government was largely carried on through the agency of courts. The county was originally governed and judged by the county court, consisting of the freeholders of the shire and presided over by that royal official, the sheriff, who in time became merely the local executive officer of the central courts. The county also elected coroners, who acted as a check upon the sheriff and performed quasi-judicial duties in holding inquests into suspicious deaths, treasure trove, etc. The whole system was kept in subordination to national interests through the justices in eyre, who, being primarily concerned in holding inquisitions into local government, were naturally sent round the country county by county. This arrangement was

followed in the procedure adopted for sending round other more purely judicial itinerant justices, so that commissions of *oyer and terminer*, gaol delivery, assize and *nisi prius* (*a*) have long been issued in respect of each county, and the counties have been organised into definite circuits. The county came to be the unit for the holding of the assizes and the sheriff still retains his duties of attending upon and assisting the judges of assize.

With the rise to power of the justices of the peace and the simultaneous decline in the sheriff's position the old county court gradually ceased to have any important functions to perform. But the justices of the peace were originally instituted to form a kind of superior constabulary and to relieve the pressure of work at the assizes, and in consequence their organisation was again based on the county, and the Crown issued commissions of the peace in respect of each county.

In the seventeenth and eighteenth centuries the justices were loaded with many administrative functions and became what we should now call the local authority for the county. Once more, therefore, justice and local government became closely linked, not only in their geographical areas, but also through the existence of one body by which both were administered. This is clear if we consider the ordinary scheme of organisation in the eighteenth century, which with the removal of administrative functions remains substantially the same to-day. Quarter sessions, composed of all the justices on the commission for the county, were held quarterly, when both criminal cases and "the county business" were dealt with. Next, the county was divided into petty sessional divisions (*b*), in each of which two or more justices of the division held regularly constituted petty sessions mainly for criminal work, and all the justices of the division met from time to time for licensing and some other purposes. Wide powers of local government were entrusted sometimes to one, sometimes to two justices. Thus there existed the most complete fusion of

(*a*) The first two are criminal, the others are civil.

(*b*) Roughly corresponding to the old hundreds.

justice and local government, both in regard to areas and personnel.

This scheme of organisation was, however, complicated by the privileged position enjoyed by cities and boroughs which had gained by charters, to a more or less extent, exclusion from the county. They followed several distinct types. First came counties of cities or towns, boroughs which had by charter been created separate counties, with all that that implied (c). Such boroughs had their own sheriffs, their own coroners, their own quarter sessions and commissions of the peace, and separate commissions of *oyer and terminer*, gaol delivery, assize and *nisi prius* issued to each of them (d). Being counties in themselves they were entirely excluded from the geographical county, both for the purposes of local government and of the administration of justice. Secondly, certain boroughs without being created separate counties had been granted their own separate quarter sessions and commissions of the peace. They still formed part of the county in which they were situated, and their relations with the county justices might be somewhat vague, unless their charter contained a *non-intromittant* clause, which effectively excluded the county justices from exercising jurisdiction within the boundaries of the borough. Thirdly, some boroughs had been granted separate commissions of the peace but no separate quarter sessions, so that they still remained subject to the jurisdiction of county quarter sessions, though they could provide their own petty sessions. Lastly, some boroughs had not even been granted a separate commission, and so for the administration of justice had to rely entirely upon the county. They, however, in common with all other cities and boroughs, were incorporated municipalities and their councils had local government functions to perform. Where a borough had a separate commission of the peace the appointment of borough justices usually rested with the municipal corporation and not

(c) Such boroughs must not, of course, be confused with the modern county borough; see above, p. 62.

(d) *E.g.* Haverfordwest, Berwick-on-Tweed, Bristol.

with the Crown, so that frequently the same persons performed the duties both of members of the corporation and justices, and corruption was widespread.

This sketch of the position at the end of the eighteenth century shows the close connection which everywhere existed between local government and the administration of justice. In this matter the reforms of the nineteenth century have effected a divorce between the two functions, almost complete in so far as it relates to the persons by whom they are respectively carried on (*e*), and to some extent altering the areas within which they are each administered. Though this process was undertaken earlier in connection with the boroughs than in the counties, it is convenient to reverse the order of history and consider first the position in counties.

Assizes.—The assizes are still held for counties, but their organisation into circuits is now the work of modern statutes which need not concern us. The sheriff has similarly ceased to have any connection with local government, and his modern position, as local executive officer of the Supreme Court, is similarly largely regulated by statute.

Counties.—The Local Government Act of 1888 transferred to county councils all the administrative work of quarter sessions in respect of each administrative county (*f*), but so that county councils were not constituted courts, nor given any of the powers of courts (*g*). Quarter sessions remain therefore purely judicial bodies and the justices have in general no local government functions.

The county councils have, however, some connection with the administration of justice within their counties. The appointment of coroners has been transferred from the freeholders of the county to the county council (*h*), and the transfer of the administrative functions has included certain

(*e*) Licensing is still, however, largely retained by the justices, and many appeals of an administrative nature are heard by them.

(*f*) Local Government Act, 1888, §§ 3 and 28.

(*g*) *Ibid.*, § 78.

(*h*) *Ibid.*, § 5; Coroners (Amendment) Act, 1926, § 2.

duties relating to the provision of court houses, etc. Broadly speaking, the Act has transferred to the county council the appointment and control of the county treasurer and the provision of the county fund, but has left all the charges, which that officer was previously while a servant of quarter sessions required to meet out of that fund, still legally due from the same source. Thus the county council has to provide out of the county fund for such matters as the expenses of assizes, quarter sessions and justices (*i*), the costs awarded by assizes, quarter sessions or justices (*j*), and the salaries of clerks to justices (*k*). In short, the county council has to finance the whole administration of justice within the county.

These matters, in which both the county council and the justices are interested, are obviously the proper subject-matter for joint consultation. Hence the Act of 1888 (*l*) provided for the establishment in each county of a standing joint committee, composed of equal numbers of justices appointed by quarter sessions and of members of the county council appointed by that body. This committee, which is also the county police authority, deals with the necessary accommodation for quarter sessions and justices.

The result is that in the modern county administrative work is divorced from judicial and undertaken by the county council, while quarter sessions, justices of the peace and the assizes have only judicial duties to perform. But links still exist between the two sets of functions. The administrative county is co-incident with the old areas administered by quarter sessions, and on any change in its boundaries corresponding changes in judicial arrangements may be made (*m*). Again, the county council has to pay for the administration of justice within its area, and where the two functions of local government and justice tend to slide into each other, the

(*i*) Local Government Act, 1888, §§ 35 (5), 66 and 100.

(*j*) *Ibid.*, § 67; Costs in Criminal Cases Act, 1908, §§ 1-4. Fines and penalties imposed within the county, except in quarter sessions boroughs, are in general payable to the county fund: Summary Jurisdiction Act, 1848, § 31.

(*k*) Local Government Act, 1888, § 84.

(*l*) *Ibid.*, § 30.

(*m*) Local Government Act, 1933, § 148.

standing joint committee, representative both of the county council and quarter sessions, is the controlling, though not the financing, authority.

Boroughs.—The position in the boroughs is not so simple as in the counties, for on the one hand the types of organisation, which the reformers of the nineteenth century had to deal with, were more varied, and on the other hand the financial relations between boroughs and counties, whereby the former pay their share of the cost of county justice from which they benefit, leads to further complications. The divorce of administrative from judicial work in the boroughs was more violent than in the counties, and the provisions of the Municipal Corporations Act, 1835 (*n*), and the Local Government Act, 1888, are somewhat involved. We can best obtain a picture of the modern position by a consideration of the different types of boroughs.

1. Counties of Cities and Towns.—These still exist. Formerly, as they did not avail themselves of the service of county justice, they made no contribution to county funds, but now their financial relations with the county council are governed by the ordinary rules applicable to county and non-county boroughs, according as they fall into one or other of these modern classes (*o*). These boroughs still have their own quarter sessions and commissions of the peace excluding altogether the jurisdiction of the county justices, and they still appoint their own coroners and sheriffs, the latter being appointed yearly by the borough council at its meeting held on the ninth of November (*p*). So far as the assizes are concerned, it is now provided for the sake of convenience that where separate commissions of *oyer* and *terminer* are not issued to them offences committed within their boundaries may be tried at the assizes for the adjoining county (*q*).

(*n*) Now the Act of 1882.

(*o*) Local Government Act, 1888, §§ 35 and 38.

(*p*) Municipal Corporations Act, 1882, § 170; Local Government Act, 1933, § 22.

(*q*) Municipal Corporations Act, 1882, § 188.

Relations between Boroughs and Counties.—Putting on one side these historical survivals which illustrate an earlier attempt to exempt some favoured boroughs from the county, we must turn to their modern counterparts, the county boroughs, and consider the broad lines of principle which distinguish them from other municipalities. The principles of the Local Government Act, 1888, in this respect may be said to be the exclusion of county boroughs from the counties and the reduction of all non-county boroughs to a position of subordination to the county comparable in many respects to that of urban districts. But the application of these principles was confined in its direct operation only to the sphere of local government, and the existing arrangements for the administration of justice were only indirectly affected. The principles clearly appear at work in the Act's provisions for governing the financial relations between boroughs and county councils. Formerly, under § 150 of the Municipal Corporations Act, 1882, the area of any borough with a separate quarter sessions was exempted from the payment of county rates, and was only liable to pay for the costs of its prosecutions at county assizes. These latter sums were paid in the form of contributions made directly by the borough treasurer to the county treasurer (*r*). In this system the Local Government Act, 1888, made considerable changes. For the future it left only county boroughs exempt from county rates and still privileged to pay for the costs of county justice, to the extent to which they shared in it, by means of this system of contributions. The inhabitants of all non-county boroughs were made directly liable to the payment of the county rates (*s*), though with such exemptions from the amount of those rates as represented the extent to which the particular borough had formerly been free from

(*r*) Municipal Corporations Act, 1882, §§ 151 and 153.

(*s*) County rates are not now, since the Rating and Valuation Act, 1925, directly levied; the county council obtains the money it requires by precepting upon the various rating authorities in its area. Still in substance, if this fact is kept in mind, it is correct and convenient to speak of county boroughs being exempt from, and non-county boroughs being liable to, the county rates, in place of the more strictly accurate "part of the general rate made by the rating authority to satisfy the county council's precept."

contributing to the cost of county justice. At the same time the Act of 1888, by restricting these exemptions from the full county rates, held out inducements designed to prevent any but county boroughs from acquiring in the future a separate quarter sessions, and any borough with a population under ten thousand in the year 1881 from maintaining any organisation for justice and police separate from that provided by the county. These provisions must now be considered in their details.

2. County Boroughs.—County boroughs are in general excluded from the county for administrative purposes, their own borough councils exercising within their boundaries the powers of county councils. Hence they are not liable to the county rate, and the county council can issue no precept to them. But this exclusion from the administrative county does not extend to cover the organisation of justice (*t*): to what extent a particular county borough is excluded from county justice and exempt from the liability to contribute towards its upkeep, depends upon whether it is a county of a city or town, or a quarter sessions or non-quarter sessions borough. To the extent to which it avails itself of county justice, whether at assizes or quarter sessions, it must contribute to the county fund. The Act provides that an equitable adjustment, reviewable after five years, is to be made between a county borough council and the county council, providing for the payment by the former of annual sums representing its share of the costs of county justice of which it avails itself and of certain other matters, and that these sums are to be paid by contributions made by the borough treasurer to the county treasurer as under the provisions of the Municipal Corporations Act, 1882 (*u*), which were formerly applicable to all quarter sessions boroughs (*v*).

(*t*) Local Government Act, 1888, § 31.

(*u*) § 153. But the Costs in Criminal Cases Act, 1908, §§ 1-4, makes costs awarded at assizes, quarter sessions or petty sessions payable out of the county fund or the general rate fund of a county borough, according to the area in which the crime was committed or supposed to have been committed.

(*v*) Local Government Act, 1888, § 32; amended by Local Government Act, 1929, 12th Schd.

3. Non-county Boroughs.—All non-county boroughs, even if counties of cities or towns, are now part of the administrative county and are liable to the payment of county rates through the issue of precepts by the county councils to their borough councils as rating authorities, but the provisions of the Local Government Act, 1888, make it necessary to divide non-county boroughs into two classes, according as they did or did not have a population in the year 1881 of ten thousand persons. Each of these classes must then be sub-divided in accordance with the judicial organisation existing in the borough in question.

(a) With a Population of at least Ten Thousand in 1881.

—These boroughs are liable to the payment of county rates, subject, however, to exemptions from the total amount of those rates in respect of any matters as to which, before the Act of 1888 came into force, they were exempt from contributing to county funds (*w*). This means that to the extent to which before the Act they were maintaining their own separate organisations for the administration of justice, they are exempt from paying towards the costs of county justice (*x*). But they no longer pay their share of county expenditure by means of contributions made between their treasurer and the county treasurer: their areas are directly liable to payment of county rates, and these, after deducting any exemptions to which their inhabitants are entitled, are raised by their borough councils acting as rating authorities in accordance with the county council's precept. It should be noticed, however, that the exemptions from part of the county rates are strictly limited to the extent to which, before the Act of 1888 came into force, the borough maintained its own system of justice. Thus the grant of a separate court of quarter sessions to a non-county borough after 1888 does not affect its position *vis-à-vis* the county council, nor entitle its inhabitants to claim any new exemption

(*w*) Local Government Act, 1888, § 35.

(*x*) *Ex parte Kent County Council and Dover Council* [1891] 1 Q.B. 389; 33 Digest 381, 906.

from county rates (*y*) : and yet the cost of maintaining separate courts within the borough must be borne by the borough itself without any assistance from the county council (*z*). The combined effect of these provisions is to make the grant of a new court of quarter sessions an expensive luxury for the inhabitants of a non-county borough, and they are designed to limit for the future the grant of separate quarter sessions to county boroughs, and to retain non-county boroughs within the general county framework.

Subject to these general financial rules applicable to county boroughs on the one hand, and to non-county boroughs with a population of ten thousand or upwards in 1881 on the other hand, we may now consider the various forms of organisation which may obtain for the administration of justice in boroughs of either class.

(i) Boroughs with Separate Quarter Sessions.—County quarter sessions are composed of all the justices on the commission for the county acting with juries, but the Municipal Corporations Act of 1835, with the experience of municipal corruption still fresh in the public memory, introduced an entirely new principle for the composition of borough quarter sessions. The court of quarter sessions for a borough has since that Act been held by the Recorder, who is a barrister of five years' standing appointed by the Crown during good behaviour (*a*), and who acts as sole judge (*b*) with the aid of a jury. To obtain a separate court of quarter sessions the borough council must petition the King in Council, and the Crown may then, if it thinks fit, grant the right to hold the court and prescribe the salary to be paid by the council to its Recorder, but so that it does not exceed the amount mentioned in the petition (*c*). A borough with a

(*y*) Local Government Act, 1888, § 37.

(*z*) Municipal Corporations Act, 1882, §§ 140, 160 and 5th Schd.; Local Government Act, 1933, § 187.

(*a*) Municipal Corporations Act, 1882, § 163. (*b*) *Ibid.*, § 165.

(*c*) *Ibid.*, §§ 162 and 163. The grant of a separate court of quarter sessions after 1888, as already mentioned, does not entitle a non-county borough to any additional exemption from county rates.

separate quarter sessions necessarily has its own commission of the peace, and the jurisdiction of the county quarter sessions does not extend to any part of the borough. County justices acting in petty sessions are not, however, automatically excluded from exercising jurisdiction within a quarter sessions borough: they are only excluded where before 1835 the borough charter contained a *non-intromittant* clause (*e*).

The borough council appoints the clerk of the peace during good behaviour (*f*), and also, if the court of quarter sessions was established before the Local Government Act of 1888 came into force (*g*), it appoints coroners, who hold office during good behaviour, and excludes the county coroners from exercising jurisdiction within the borough (*h*).

(ii) Boroughs with Separate Commissions of the Peace.—Some boroughs, without maintaining their own court of quarter sessions, have a separate commission of the peace, so that justices are appointed by the Crown to act only within the borough in petty sessions. The Crown may grant a separate commission on the petition of the borough council (*i*) and can alone appoint the justices on it (*j*), the practice existing before 1835, whereby the borough justices were locally elected or appointed, having been abolished except in the City of London. The mayor during his year of office is *ex officio* a justice for the borough, with the right of precedence, and he retains his right to act as a justice for one year after he ceases to be mayor (*k*). The borough justices appoint their own clerk (*l*), and the cost of providing accommodation for the justices and

(*e*) Municipal Corporations Act, 1882, § 154. Fines and penalties imposed in a quarter sessions borough are payable to the general rate fund of the borough: Municipal Corporations Act, 1882, § 221.

(*f*) *Ibid.*, § 164.

(*g*) But not if only granted thereafter: Local Government Act, 1888, § 37.

(*h*) Municipal Corporations Act, 1882, § 171; Coroners (Amendment) Act, 1926, § 2.

(*i*) Municipal Corporations Act, 1882, § 156.

(*j*) *Ibid.*, § 157.

(*k*) Local Government Act, 1933, § 18.

(*l*) Municipal Corporations Act, 1882, § 159.

the clerk's salary must be borne by the general rate fund of the borough (*m*).

Borough justices exercise jurisdiction within the borough as if they were county justices and as if the borough formed a petty sessional division (*n*). But the mere grant of a separate commission of the peace does not exclude the jurisdiction of county quarter sessions, nor even prevent county justices from acting in petty sessions within the borough (*o*). Moreover the borough remains within the jurisdiction of the county coroners.

(iii) Boroughs with neither a Separate Quarter Sessions nor a Separate Commission of the Peace.—Such boroughs avail themselves entirely of the services of county justice, and in consequence, if not county boroughs, their inhabitants are not entitled to any exemption from county rates. At the same time they have the rudimentary elements of a judicial organisation of their own, for the mayor and last ex-mayor are *ex officio* justices for the borough, and by sitting together can act as a borough petty sessions (*q*).

(b) Boroughs with a Population less than Ten Thousand in 1881.—We now come to a class of small boroughs, apparently regarded by the Legislature in 1888 as mere survivals of former greatness and sometimes decked out in a panoply of separate judicial organisation totally unfitted to their present importance. The Local Government Act of 1888, in order to induce the surrender of these privileges, has imposed the whole burden of their upkeep on these boroughs without any corresponding exemption from county rates, and at the same time

(*m*) Municipal Corporations Act, 1882, § 160; Local Government Act, 1933, § 187. Fines and penalties imposed within a borough with a separate commission, but not being also a quarter sessions borough, are payable to the county fund: Summary Jurisdiction Act, 1848, § 31; *George v. Thomas* [1910] 2 K.B. 951; 33 Digest 382, 909.

(*n*) Municipal Corporations Act, 1882, § 158.

(*o*) *Ibid.*, § 154; *Reigate Corporation v. Hart* (1868) L.R. 3 Q.B. 244; 33 Digest 459, 1717; *Lawson v. Reynolds* [1904] 1 Ch. 718; 33 Digest 287, 30.

(*q*) Local Government Act, 1933, § 18.

has offered to them means of shedding their expensive dignities. Thus the inhabitants of these small boroughs must pay the full county rates without any exemption, and if they wish to continue enjoying the luxury of a separate quarter sessions or commission of the peace, they must pay for them also. One further step the Act has taken : even though they maintain a separate court of quarter sessions the councils of these small boroughs have not the power, enjoyed by the councils of other quarter sessions boroughs, to appoint their own coroners ; but their boroughs are within the county coroners' jurisdiction (*r*).

The financial inducements, which it was hoped would lead these smaller boroughs to hasten to rid themselves of separate quarter sessions or separate commissions of the peace, are supported by provisions enabling them to produce the desired result. The Crown may on the petition of the council of such a borough by Order in Council revoke the grant of a separate court of quarter sessions, or by Letters Patent revoke the grant of a separate commission of the peace (*s*). In this manner the Act of 1888 was designed to go some considerable way towards merging small boroughs in the general framework of county organisation.

Stipendiary Magistrates.—Before leaving the subject of the municipal organisation of justice, we must notice the institution of stipendiary magistrates. The precedent of paid professional justices of the peace, set by the appointment of metropolitan police magistrates, had been so successful that in the nineteenth century it was felt desirable to give other urban centres an opportunity of following it. Stipendiary magistrates may be appointed in boroughs (*t*) and in urban districts with a population of twenty-five thousand persons (*u*). To obtain the appointment of a stipendiary magistrate the

(*r*) Local Government Act, 1888, § 38, amended by Local Government Act, 1933, 11th Schd.

(*s*) Local Government Act, 1888, § 38.

(*t*) Under the Municipal Corporations Act, 1882, § 161.

(*u*) Under the Stipendiary Magistrates Act, 1863.

council of the borough or urban district in question (v) must petition the Home Secretary, setting out at the same time the salary it is willing to pay. The Crown may then appoint a barrister of seven years' standing and determine the salary, not being greater than that mentioned in the petition, which shall be paid to him by the council. On a vacancy occurring in the office the same procedure must be gone through again if it is desired to continue to employ a stipendiary, so that a council is not bound, by presenting one petition, to maintain a stipendiary magistrate for all time.

A stipendiary magistrate is a justice of the peace for his borough or district, and can sit either alone or with other justices. When he sits alone he has all the powers of two ordinary justices—that is, he can act as a court of petty sessions. If he sits with other magistrates his exceptional powers temporarily disappear; the decision of the majority is binding, and in reaching that decision the stipendiary's voice counts only as one. He is, however, only intended to act in petty sessions and is altogether debarred from sitting by virtue of his office in quarter sessions.

(v) In the latter case by a resolution supported by two-thirds of the members of the council.

CHAPTER XI

THE METROPOLIS

London Government.—The system of local authorities described above suffices to provide organs for the administration of local government services throughout England and Wales with the exception of the Metropolis. In the area often called Greater London, however, there exist local authorities differing in many respects from those found elsewhere, and unique both in their organisation and in their functions.

The legislative result of this difference between the Metropolis and the rest of England and Wales is to be seen in the fact that the local authorities in the metropolitan area are governed, in so far as their constitutions are concerned, by a separate code of enactments, which the Local Government Act of 1933 made no attempt to consolidate (*a*). Nor is this all ; as the problems of local government in London differ in degree, if not in kind, from those facing local authorities in the provinces, Acts dealing with particular services either do not apply in London, being replaced by special legislation (*b*), or contain special provisions, frequently under the heading of “Application to London,” for enabling them, with necessary modifications, to be applied to the exceptional types of local authorities found in the metropolitan area.

Reasons for Peculiar System.—The Metropolis has thus been singled out for exceptional treatment for three reasons.

(*a*) The Local Government Act, 1933, does not extend to authorities within the Metropolis with the exception of § 97 and Parts X and XI, dealing respectively with joint committees, district audit and local financial returns. The various enactments governing the constitution of the London County Council and the twenty-eight metropolitan boroughs have, however, now been consolidated by the London Government Act, 1939, though this Act does not, in general, apply to the City of London.

(*b*) For instance, the Public Health Act, 1936, does not apply in the Metropolis, but is replaced by the Public Health (London) Act, 1936.

✓ In the first place, as the capital of the country and the seat of government it was natural that its problems of local administration should receive peculiar consideration ; for instance, the control of the police force is not vested in any local authority but directly resides in a member of the Central Government, the Home Secretary. Secondly, the growth of a large and crowded urban population inevitably forced into prominence the problems of sanitation at a time earlier than that at which they became urgent in other parts of the country. Lastly, the vast size of greater London and the huge population contained within it made necessary special forms of organisation.

History of London Government.—These three causes of the exceptional system of local government obtaining in the Metropolis are most clearly visible when the history of that system is examined. This requires a sharp distinction to be drawn between the City of London and all those other areas, which, with the growth of population, were gradually covered with houses and which at the present day still encroach on the open country of the Home Counties, for the City failed to extend the area under its legal rule with the progressive expansion of the *de facto* town, and remains to-day a small island of obstinate mediaeval structure in the midst of a sea of modern local authorities.

The City Corporation.—The City of London then is the nucleus from which greater London has spread, but it has not itself expanded and still retains many of the characteristics it acquired in the Middle Ages. Legislation has been tender with it in this respect, for not only was the City Corporation left unreformed by the Municipal Corporations Acts of 1835 and 1882 and the Local Government Act, 1933, but it has even withstood to a great extent attempts to unify the local government of the Metropolis under the rule of the London County Council. The City of London therefore stands to a large extent outside the system governing the rest of the Metropolis ; it maintains its own police force (c), it is to some

extent free from the subordination to the London County Council in which other metropolitan authorities stand (*d*), and it still retains its mediaeval organisation. This survival of such a unique institution is easily explicable when the small size of the City—about one square mile in extent—and the character of the area covered by it—almost exclusively occupied by business houses—together with its great wealth, in the disposal of which the Corporation has a practically unrestricted power, are remembered.

London Government outside the City.—As has already been said, the growth of London, once it had crossed the narrow boundaries of the City, passed out of the control of the City Corporation, and the problems arising in governing densely populated urban areas were cast upon the only other organisation then known to the law—that of the parishes supplemented by the county justices. These proved hopelessly inadequate in undertaking the provision of the services such as a large town required, and their activities were assisted or superseded by various other authorities. Thus highway maintenance and especially the proper paving of streets were duties which the parochial organisation, however successful it might be in the country, was totally unsuited to perform in the growing suburbs, and resort was had during the eighteenth century to local Acts setting up bodies of paving commissioners. Though a temporary improvement, this device did not meet the problem, for the areas administered by the different bodies of commissioners did not cover the whole of the urban portions of London, nor were the commissioners themselves subordinated to any body capable of co-ordinating their work. It was not indeed until 1817 that Michael Angelo Taylor's Act (*e*) gave some degree of uniformity to their powers and enabled them to extend their areas to include places previously left without any authority charged with street maintenance.

Sanitation.—Again, the sanitary problems of greater London were very inefficiently tackled by several bodies of

(*d*) See below, p. 261.

(*e*) The Metropolitan Paving Act, 1817.

commissioners of sewers. These were created by commissions issued by the Crown under the Statute of Sewers of 1531, and were designed primarily to provide for land drainage. In the Metropolis, in addition to their primary duty, these bodies were faced with the further task of providing the system of main drainage which the vast crop of houses beginning to appear in the eighteenth century made necessary. At the commencement of the nineteenth century eight bodies of sewer commissioners existed and their administration was not unified until 1848, the year in which the first great Public Health Act was passed, when one new body of Commissioners of Sewers for the Metropolis was appointed more capable of meeting the needs of urban sanitation (f).

Vestries and District Boards.—In other matters local government in greater London was at the beginning of the nineteenth century still in the hands of parish vestries and the county justices. In 1834 they, in common with their provincial counterparts, lost their poor law functions in favour of the boards of guardians set up under the Poor Law Amendment Act of that year, but they did not suffer the progressive decline which in the country subsequently led to the total obsolescence of the vestry as a local authority. In the Metropolis, in many, if not most of the parishes the impossibility of transacting business in open vestries led to the creation by local Acts of select vestries or of district boards governing two or more small parishes. Moreover under certain adoptive legislation passed early in the nineteenth century (g) a parish was enabled to provide for its administration being carried on by a select vestry of a new type, in which the vestrymen were popularly elected. Outside the City of London the absence of any municipal organisation and the earlier growth to prominence of the problems of urban government, forced the Legislature to cast upon the metropolitan vestries and on the district boards powers and duties which elsewhere it later conferred upon new *ad hoc* authorities. While in the country at large the parish and its vestry declined

(f) Metropolitan Sewers Act, 1848 (since repealed).

(g) Vestries Act, 1831; usually called Hobhouse's Act.

into insignificant disuse, in the Metropolis the parochial vestry grew in importance as the normal unit for the administration of local government.

This system, however, in addition to the lack of uniformity in the structure and area of vestries and district boards, suffered from the great defect that it was subject to no superior authority exercising a general control and designed to co-ordinate the work of the many small authorities which existed in the Metropolis. An attempt to overhaul the whole scheme of London local government and to meet this defect led to the passing of the Metropolis Management Act of 1855.

Reform and Co-ordination.—This Act reformed the organisation of the vestries and district boards (*h*), and transferred to them the powers possessed by the various bodies of paving commissioners which had survived by their side. In addition it created the Metropolitan Board of Works consisting of forty-six members elected, not by the ratepayers, but by the vestries and district boards of the Metropolis. This body was erected into an authority exercising certain powers and controlling such services as main drainage, streets and bridges, and fire brigades throughout the whole of the metropolitan area.

In 1888 the Local Government Act of that year abolished the Metropolitan Board of Works and set up in its place the modern London County Council, in structure closely resembling other county councils, and of which the members are directly elected by the ratepayers. Finally, the London Government Act of 1899 abolished the old metropolitan vestries and district boards and replaced them by twenty-eight metropolitan borough councils.

Thus the government of the Metropolis at the present day (*i*) is provided for by a unique system of authorities, between

(*h*) It set up twenty-three vestries and fifteen district boards of works.

(*i*) Though the London Government Act, 1939, introduced a number of amendments to the previous law, it remains largely a consolidating Act, on the lines of the Local Government Act, 1933.

which powers and services are divided in a peculiar way. The City Corporation, the London County Council and the metropolitan borough councils, as well as their mutual relations need consideration. Moreover the sphere of local government, as ordinarily understood elsewhere, is curtailed by the existence of a number of special authorities which will require mention below.

1. The City Corporation.—In the first place, the City of London is, both in the constitution of the corporation which governs it, and in its relations with the London County Council, in a special position. The Corporation of the City of London is a body corporate by prescription (*j*) and is called by the style of “the Mayor and Commonalty and Citizens of the City of London” (*k*). It is a county in itself, electing its own sheriffs, while its Lord Mayor is the head of the City Lieutenancy and even Admiral of the Port of London. It is still largely governed under the provisions of the many charters which have been granted to it from time to time by the Crown. Under these charters the Corporation acts through three courts, to each of which certain functions are assigned; and when we come to enquire into the internal organisation of the Corporation we are at once confronted with a clear illustration of the extent to which trading guilds in the Middle Ages had become identified with the local government of towns in which they existed.

First comes the Court of Common Hall, consisting of the Lord Mayor, sheriffs, aldermen and such of the liverymen of the seventy-odd City Companies as are freemen of the City. This body annually elects the two City sheriffs, and nominates two aldermen, from among those who have served the office of sheriff, for the election of one by the Court of Aldermen as Lord Mayor. The Court of Aldermen consists of twenty-six aldermen elected for life. The City is divided into twenty-five wards, each electing one alderman, and the remaining

(*j*) Coke, *Second Institute*, p. 330.

(*k*) Stat. 2 Will. & M. c. 8, § 3 (1690).

alderman sits for the non-existent ward of Bridge-Without (*l*). The election of an alderman is held in the wardmote of the ward in question, which now consists of the local government electors of the ward (*m*). The Court of Aldermen elects certain officers, notably the Recorder of the City of London. Each alderman is *ex officio* a justice of the peace, and when sitting alone has the jurisdiction elsewhere conferred upon two or more justices in petty sessions. Quarter Sessions for the City are held before the Lord Mayor, Aldermen and Recorder, but this Court has little criminal jurisdiction as all indictable offences committed in the City are tried at the Central Criminal Court.

Lastly, there is the Court of Common Council, consisting of the Lord Mayor, aldermen and two hundred and six common councilmen. These latter are elected annually at the wardmotes. The Court of Common Council is the real governing body of the Corporation. It controls the property of the Corporation; acts as sanitary authority for the City and is port health authority for the Port of London; maintains certain bridges over the Thames and generally is in a position analogous to that of the council of a county borough. In some respects, however, it is relegated to a position of subordination to the London County Council, comparable to that occupied by metropolitan borough councils, particularly in matters of education, main drainage, hospitals, public assistance, and fire brigades (*n*).

It must frankly be recognised that the survival of the City Corporation in all the grandeur of its mediaeval trappings, as well as the powers which under modern statutes it exercises, are both dictated rather by a respect for the traditional greatness of the City of London than by any very strong conviction

(*l*) *I.e.* Southwark, over which ancient borough for some purposes the City exercised jurisdiction: see G. D. Muggeridge, "The Borough of Southwark," *Law Quarterly Review*, vol. xli (1930), p. 54.

(*m*) Formerly membership was confined to liverymen.

(*n*) Education Act, 1944, § 117; Public Health (London) Act, 1936, Parts II and X; Poor Law Act, 1930, § 2 and Part V. Though the London Government Act, 1939, does not, in general, affect the City, the provisions relating to medical officers of health and sanitary inspectors (§§ 77-84, 95) are applied to it by § 96.

that its organisation is well adapted to modern local government. That local government in the City is well administered is, in fact, possible in spite of, rather than because of the structure of the organs through which it is carried on. The City Corporation remains a picturesque and honourable relic of a former state of society, and is important not so much because of its local government activities as of its charitable work, and the positions of high dignity which it can offer to its members, and the honourable hospitality it can give to distinguished visitors from other countries.

Relations with the London County Council.—In general the administrative county of London does include the area of the City, but in many respects the Common Council of the City of London is more free from the control of the County Council than are the metropolitan borough councils (*o*). This general provision and many special enactments serve to put the City in a peculiar position in relation to the London County Council, and to remove it to some considerable extent from the control which the latter body exercises over metropolitan borough councils.

2. The London County Council.—The London County Council is in some ways distinguished from ordinary county councils both in its internal organisation and in the extent of its powers over the administrative county of London. Like other county councils the London County Council consists of a chairman, county aldermen and county councillors and, except for the fact that the aldermen number only one-sixth of the whole number of councillors (*p*), its structure is identical with that of any of its provincial counterparts. Its powers are, however, generally much wider than those conferred upon other county councils, a difference which is rendered essential by the fact that the whole administrative county of London is

(*o*) London Government Act, 1939, § 1: the City is not a metropolitan borough; though it is for some purposes treated as being in the same position as a metropolitan borough; *e.g.* education, Education Act, 1944, § 117.

(*p*) London Government Act, 1939, § 7.

an exclusively urban area ; in fact the London County Council is in this respect more akin to a county borough council than to an ordinary county council. But it differs most markedly from other county councils and county borough councils in that neither main roads (*q*) nor police are under its control. The London County Council is the sole poor law authority (*r*) and has wide powers in respect of main drainage, streets, housing, education and public health. Metropolitan borough councils in these fields at most have subsidiary powers, subordinated in their exercise to the County Council's control. Thus under the Public Health (London) Act, 1936, the metropolitan borough councils are given wide sanitary powers, but, where the London County Council is satisfied that any of them has made default in performing certain of its duties under the Act, the County Council may itself do the work and recover the expense from the metropolitan borough council in default (*s*). Again, though metropolitan borough councils are authorised in certain cases to make bye-laws relating to sanitary matters, the London County Council has similar powers often on closely related topics; and, although they are not made by itself, each of the former authorities is required to enforce all the County Council's bye-laws within its area (*t*). Similarly, both the London County Council and each metropolitan borough council have powers to make bye-laws for the good rule and government and the suppression of nuisances within the county and the borough respectively, but the bye-laws made by the metropolitan borough councils must not be inconsistent with those made by the county council (*u*).

A similar position of subordination to the County Council is imposed on metropolitan borough councils in the exercise of their borrowing powers. In this matter two distinct codes formerly existed, one drawn from the Metropolis Management Acts and the other laid down by the Public Health (London)

(*q*) London Government Act, 1899, § 6, as amended by the London Government Act, 1939, 8th Schd.

(*r*) Poor Law Act, 1930, §§ 2 and 163.

(*s*) § 291.

(*t*) *E.g.* Public Health (London) Act, 1936, §§ 84 and 107.

(*u*) London Government Act, 1939, § 146.

Act, 1891. Where the provisions of the Public Health (London) Act, 1891, applied, the sanction of the Minister of Health was alone required. These provisions have, however, been repealed by the Public Health (London) Act, 1936 (*v*), and the earlier code alone remains. Under this a metropolitan borough council may only borrow for authorised purposes with the sanction of the London County Council, though an appeal to the Minister of Health lies from that body's refusal to consent (*w*).

It must not, however, be assumed that the metropolitan borough councils are merely concerned with carrying out the directions given to them by the County Council nor that they are entirely subservient to the latter body's control. They have important functions to perform, mainly of a sanitary nature, and they are the authorities concerned exclusively with valuation and rating. Moreover to some extent they attempt to consider the problems which face them in a manner which transcends the boundaries of each borough and recognises that their interests are largely one. This is performed through the agency of the Metropolitan Boroughs Standing Joint Committee, a purely voluntary body on which each of the metropolitan borough councils and the City Corporation are represented. This Committee has no inherent powers, but nevertheless enables matters of common interest, affecting the authorities represented on it, to be discussed and some degree of co-ordination to be obtained.

3. Metropolitan Borough Councils. — Metropolitan borough councils were not subject to the provisions of the Municipal Corporations Act, 1882, nor are they now subject to the provisions of the Local Government Act, 1933, but they are creatures of the London Government Act, 1899 (*x*). In consequence they differ in many points from the councils of boroughs

(*v*) Public Health (London) Act, 1936, § 290 and 7th Schd.

(*w*) London Government Act, 1939, § 124. This does not apply in the case of money borrowed for purposes of the supply of electricity, in which case the consent of the Electricity Commissioners is necessary, or where the consent of the Minister of Health is specifically necessary: *ibid.*, § 145.

(*x*) Their constitution and general functions are now largely governed by the London Government Act, 1939.

governed by the former Acts. In the first place a metropolitan borough council is itself incorporated (*y*), while in municipal boroughs the whole body of burgesses forms a body corporate and the borough council is merely the executive organ of the wider municipal corporation. Secondly, both a metropolitan borough council and the council of a municipal borough consist of mayor, aldermen and councillors, but in the former body the number of aldermen is only one-sixth instead of one-third of the number of councillors (*z*). Thirdly, the London Government Act, 1899 (*a*), permitted a metropolitan borough council by a special resolution to obtain an order from the Local Government Board providing that the whole number of councillors should retire and be elected together, in place of the system of partial annual renewal otherwise applying, which governs municipal borough councils. This power has been utilised in every case, so that all the councillors of metropolitan boroughs are elected together for three years and retire together (*b*). Lastly, it must be noticed that, unlike municipal boroughs, all the accounts of metropolitan borough councils are subject to the audit of the district auditor (*c*), and no provision is in consequence made for the election of borough auditors.

Equalisation of the Rate Burden.—No sketch of local government in the Metropolis would be complete without a brief mention of the peculiar system under which attempts have been made to equalise the burden of rates over the whole metropolitan area, and so make the richer districts contribute towards the cost of services in the poorer. The system of rating in London still depends upon the provisions of the Valuation (Metropolis) Act, 1869, as subsequently amended, and is not governed directly by the Rating and Valuation Act, 1925 (*d*). The rating authorities for the Metropolis are

(*y*) London Government Act, 1939, § 17.

(*z*) *Ibid.*, § 21.

(*a*) § 2 (8).

(*b*) This now forms an integral part of the London Government Act, 1939. See § 23 (3).

(*c*) Local Government Act, 1933, § 219.

(*d*) Rating and Valuation Act, 1925, § 70.

the Common Council for the City of London (*e*) and the metropolitan borough councils (*f*). The City and each metropolitan borough also constitute separate assessment areas, each with an assessment committee (*g*), and these authorities levy rates sufficient both for their own requirements and also for satisfying the precepts of the London County Council and, in the case of metropolitan borough councils, the precepts of the Receiver of the Metropolitan Police District. In order to obtain an equalisation of the burden of the rates over the whole metropolis there formerly existed two funds—the “Equalisation Fund” (*h*) and the “Metropolitan Common Poor Fund” (*i*). The latter fund was designed to equalise the burden of the poor rate and was administered by the Minister of Health until 1928 (*j*), when it was transferred to the charge of the Metropolitan Asylums Board. The guardians of each metropolitan poor law area paid into this fund contributions based on the rateable values of their areas, and out of this fund periodically there were made payments to guardians in respect of the expenditure incurred by them in the provision of certain poor law services. The existence and functions of the Metropolitan Asylums Board also contributed materially to the solution of the problem of equalising the rates. This body maintained hospitals and other institutions for dealing with infectious diseases and insanity among the poor and had various ancillary public health duties.

These complicated arrangements were rendered no longer necessary by the coming into force of the Local Government Act, 1929, under which the whole administration of the poor law in the administrative county of London was transferred to the County Council, and in consequence both the Metropolitan

(*e*) Which was made the overseer for the City by the City of London (Union of Parishes) Act, 1907.

(*f*) London Government Act, 1899, § 11, as amended by the London Government Act, 1939, 8th Schd.; see Rating and Valuation (Apportionment) Act, 1928, § 7 (2).

(*g*) Local Government Act, 1929, § 18 (1) (*h*).

(*h*) Set up by the London (Equalisation of Rates) Act, 1894.

(*i*) Set up by the Metropolitan Poor Act, 1867.

(*j*) Local Authorities (Emergency Provisions) Act, 1928.

Common Poor Fund (*k*) and the Metropolitan Asylums Board (*l*) have been abolished.

The Equalisation Fund set up in the Metropolis by the London (Equalisation of Rates) Act, 1894, was designed to produce some measure of uniformity between the rates levied in each area in respect of services other than the poor law. The fund was administered by the London County Council. In each half-year the fund was assumed to be provided with a sum of money equivalent to one-half of a rate of sixpence in the pound over the whole county; in other words, each authority was assumed to provide its contribution to the fund in accordance with its rateable value. Then the fund was apportioned between the City and the Metropolitan Borough Councils in accordance with their populations. The fund was a notional one, in the sense that in fact contributions and grants were not made in every case, the amounts of the contributions due from, and of the grants due to each authority were calculated, and then the one was set off against the other, only the balance being paid into the fund, if the contributions exceeded the grant, or being paid out of the fund to the authority, if the amount of the grant exceeded the amount of the contribution.

General Exchequer Grants.—The effect of the general provisions of the Local Government Act, 1929—substituting the general exchequer grant, based upon the formula of “weighted population,” and intended to replace the losses consequent upon de-rating, as well as to correspond rather to the needs than to the expenditure of local authorities—has been to enable these provisions with some modifications to produce a result similar to that brought about by the former Equalisation Fund, and that fund has in consequence been abolished (*m*). Under the Act of 1929 the London county apportionment is determined as in other cases; that is, in the first two “fixed grant periods” seventy-five per cent. is based

(*k*) Local Government Act, 1929, § 18 and 9th Schd., para. 8.

(*l*) *Ibid.*, § 18.

(*m*) *Ibid.*, § 98.

on losses on account of rates and discontinued grants, during the third period fifty per cent., during the fourth period twenty-five per cent., while in each of these fixed grant periods the balance is determined in accordance with the formula of weighted population, which in the fifth and all succeeding fixed grant periods will be the sole test for the apportionment of the whole general exchequer contribution (*n*). But the county apportionment of London is dealt with in a peculiar manner. Broadly speaking, the Common Council of the City and each of the metropolitan borough councils are entitled to stand, *vis-à-vis* the county council, in much the same position as that in which county borough councils stand in relation to the Exchequer when claiming their county borough apportionments (*o*). The Common Council of the City and each of the metropolitan borough councils is entitled to receive one-third of the sum which would have been payable to it by the Exchequer had it been a county borough council; that is, during the first four fixed grant periods it receives an appropriate percentage, decreasing progressively from seventy-five to twenty-five, of its loss on account of rates and grants, and one-third of the sum it would have received as a county borough council of the available balance of the general exchequer contribution in accordance with the formula of weighted population (*p*). Ultimately in the fifth and all succeeding fixed grant periods these authorities will each receive out of the county apportionment one-third of the sum they would have obtained under the formula had they been county borough councils, but by that time the whole general exchequer contribution will be divisible in accordance with the formula. Thus as the part of these authorities' general exchequer grants based on loss of rates and grants declines,

(*n*) Local Government Act, 1929, § 88. There is, however, no weighting for sparsity of population. See above, p. 184. As to the postponement of the end of the third period, see above, p. 186.

(*o*) *Ibid.*, § 98.

(*p*) With the slight modification that the weighting for unemployment is omitted, because the poor law is exclusively within the control of the County Council, whereas in county boroughs the county borough councils are poor law authorities.

that part representing one-third of the sum, which would be payable to them in accordance with the formula had they been county borough councils, will proportionately increase, until it governs the whole of the grants paid to them. After deducting these amounts from the county apportionment, the London County Council receives the balance as its own general exchequer grant.

Additional exchequer grants (*q*) are payable in London as in other localities (*r*), but the payment of supplementary exchequer grants is governed by a set of complex provisions designed to some extent to enable the losses, falling on some of the metropolitan authorities under the new system of block grants, to be recouped out of the gains produced by that system in other areas (*s*).

Future Development.—Finally, it must be mentioned that the present system of local government in the Metropolis is not now without its critics. Greater London has outgrown even the area administered by the London County Council, and on the fringes of the administrative county there have arisen urban areas indistinguishable in appearance from London and yet organised as county boroughs, or as boroughs or urban districts falling within the jurisdiction of the ordinary county councils of the Home Counties. In addition the change in recent years in the methods of communication and in the character of different areas has led to the necessity of considering the whole problem of London government anew. A Royal Commission, appointed under the chairmanship of Lord Ullswater, reported upon the matter in 1923 (*t*). One of the problems its members sought to solve—that of the equalisation of the rate burden—has been largely settled by the provisions of the Local Government Act, 1929, but the wider question

(*q*) See above, p. 188.

(*r*) Local Government Act, 1929, § 99.

(*s*) *Ibid.*, § 100; Local Government (Financial Provisions) Act, 1937,

§ 7.

(*t*) *Report of the Royal Commission on London Government*, Cmd. 1830/1923.

of the organisation of greater London for local government was answered in a diversity of ways, and practically no changes in the law have in consequence been made. The views expressed in the majority and two minority reports are interesting as showing a unanimous desire to co-ordinate the administration of those urban areas lying, almost accidentally, outside the administrative county of London with the government of London itself, but a wide disagreement as to the way in which this could best be done.

The majority report expressed the opinion that the existing system should remain, but that the extra-metropolitan authorities should by amalgamation be enlarged in size, and that co-ordination should be sought through central control exercised by Government Departments acting with the assistance of an advisory committee. The first minority report, while suggesting the unified provision of certain services by a central authority, wished to remove the overriding powers of the London County Council and to carve up greater London into a number of county boroughs. Lastly, in direct opposition to this view, the second minority report stressed the homogeneity of London and the problems of its government, and insisted on the extension both in area and functions of some central co-ordinating body, subject to whose activities other local authorities should be allowed to continue as independent entities.

The Local Government (Boundary Commission) Act, 1945 (*u*), does not apply to London (*v*), but the subject was referred to in the White Paper on "Local Government in England and Wales during the Period of Reconstruction" (*w*), which preceded the passing of that Act. It was therein proposed that the County of London should be excluded from the sphere of the Commission but that an authoritative body should be appointed to inquire into and advise the Government on the local government problems within the county.

(*u*) See above, Ch. III.

(*v*) Local Government (Boundary Commission) Act, 1945, § 1.

(*w*) Cmd. 6579/1945.

Services not administered by Local Authorities.—

Not only is local government in the Metropolis administered by local authorities unique in their organisation and mutual relations, but the very scope of local government is more confined than in the remainder of England and Wales. London as the seat of Government and as the largest urban area in the country has presented special problems for many of which solutions have been sought by resort to special *ad hoc* authorities or by entire removal from the field of local government. Moreover, as the *de facto* limits of Greater London have advanced beyond the boundaries of the administrative county, the areas of these special authorities often extend to cover the whole or part of districts administered by ordinary extra-metropolitan authorities surrounding the County of London, and to this extent the scope of local government is limited even in the areas of these latter authorities. It remains to consider some of the more important of these special services.

1. The Metropolitan Police Force.—The development of London raised many problems, but none more pressing than the provision of an adequate police force.

That the organisation suitable for country districts was inadequate when applied to the entirely urban parishes surrounding the City of London was most clearly seen in the inefficiency of the parochial unpaid constable, as well as in the corruption and extortion of the "trading justices," who obtained inclusion on the commission of the peace in order to ply the trade of performing their judicial functions in return for the court fees which they could exact. Here it was that reform first came and the beginnings of the modern system of London government began to appear.

Since the end of the seventeenth century the necessity for a "Court" justice of the peace, to issue warrants for the apprehension of offenders obnoxious to the Government, had the result of gradually making the justice sitting at Bow Street assume the position of a salaried police magistrate. This

precedent was followed at the end of the eighteenth century when the simultaneous failure of the Middlesex Bench and the parochial constabulary had become too evident to be longer disregarded. The Metropolitan Justices Act, 1792, dealt with both problems. It instituted seven new police offices, in each of which and in the Bow Street office three stipendiary magistrates appointed by the Crown were to act. Their salaries were to be paid from a fund created out of the court fees taken by them, and in so far as this fund was insufficient for the purpose, out of the Consolidated Fund. The "trading justices" were effectively put down by a provision that no other justices were to take any fees within the area over which the police magistrates had jurisdiction. Moreover to each police office six paid constables were attached to execute the warrants and act under the orders of the stipendiaries. The whole administration of justice and police so set up was put under the control of the Home Secretary. In 1800 another police office was set up, and thereafter until the creation of the Metropolitan Police Force in 1829, the number of paid constables attached to each police court was gradually increased—in 1802 the number was raised to eight each, in 1811 to twelve, and in 1821 the number of paid constables was to be "sufficient" (x).

The salaried metropolitan police magistrates still remain in existence, but the direct control of the police constables was taken from them in 1829, when the Metropolitan Police Force was set up as a single organisation (y). This force was originally controlled from a new police office at Westminster, where two additional salaried justices were appointed to govern it. In 1839 these latter became commissioners (z). In 1856 the control of the force was placed in the hands of one commissioner and two assistant commissioners acting under the direction of the Home Secretary (a) and controlling the policing of an area extending over the parishes situated within fifteen

(x) See Maitland, *Justice and Police*, p. 108.

(y) Metropolitan Police Act, 1829.

(z) Metropolitan Police Act, 1839.

(a) Metropolitan Police Act, 1856.

miles from Charing Cross, with the exception of the City of London, which since 1839 has provided itself with its own paid police (*b*).

This is still the system under which greater London is policed. The provision of an adequate police force is not in this area, except within the City of London, a local government service at all. The police authority for the Metropolis is the Home Secretary, and under his control the actual government of the force is entrusted to a Commissioner and five Assistant Commissioners appointed by the Crown (*c*). The expenses of maintaining the force are covered partly by a special police rate and partly by a government subvention.

2. The Metropolitan Water Board.—The Metropolitan Water Act, 1902, constituted the Metropolitan Water Board to acquire the undertakings of nine water companies and to supply water in the administrative County of London and a wide area adjoining. The Board is a body corporate consisting of a chairman and vice-chairman and sixty-six other members appointed by the London County Council, the Common Council of the City, the metropolitan borough councils, the councils of the other counties, boroughs and districts within which it supplies water, and by Thames Conservancy and the Lee Conservancy Board.

3. The London Passenger Transport Board.—The London Passenger Transport Act, 1933, created the London Passenger Transport Board to provide an adequate and properly co-ordinated system of passenger transport, both by road and rail, within an area bounded by the circumference of a rough circle twenty-five miles in radius. For this purpose the Board was given powers to acquire the undertakings of companies and local authorities operating tramway, omnibus and underground railway undertakings. The Board is a body corporate consisting of a chairman and six other members. But whereas the members of the Metropolitan Water Board

(*b*) City of London Police Act, 1839.

(*c*) Metropolitan Police Act, 1933. See further p. 655.

are nominated by the local authorities in the area it serves, the London Passenger Transport Act adopted an entirely different principle designed to remove the members of the Transport Board from any suspicion of representing political or sectional interests. A body of "Appointing Trustees," including such persons as the chairman of the London County Council, the president of the Law Society, the chairman of the Committee of London Clearing Bankers and the president of the Institute of Chartered Accountants, has the duty of nominating the members of the London Passenger Transport Board.

4. Other Authorities.—The Port of London, stretching as far up the Thames as Teddington Lock, is controlled by the Port of London Authority created by the Port of London Act, 1908. Its members are partly elected by users of the Port and partly appointed by the Admiralty, the Minister of Transport, Trinity House, and the London County Council and the City Corporation. For sanitary purposes, however, the Common Council is port health authority (*d*). Above Teddington the Thames is controlled by the Conservators of the River Thames. The London Traffic Act, 1924, created the London and Home Counties Traffic Advisory Committee representative of Government Departments, the London Passenger Transport Board, the railway companies and the local authorities within its area (*e*). This area corresponds, though not exactly, with that of the London Passenger Transport Board. The committee, as its name implies, has the duty of advising the Minister of Transport, who may make regulations for the relief of traffic congestion, and the London Passenger Transport Board.

(*d*) Public Health (London) Act, 1936, § 5.

(*e*) London Passenger Transport Act, 1933, § 58 and 12th Schd.

PART II.

CENTRAL CONTROL OVER LOCAL AUTHORITIES

SUMMARY

	PAGE
Introduction	277
CHAPTER XII. The Necessity of Legislative Control	281
CHAPTER XIII. The Acquisition of Powers	292
CHAPTER XIV. Delegated Legislation	317
CHAPTER XV. Central Administrative Control . .	338
CHAPTER XVI. Local Government and the Law Courts	369
CHAPTER XVII. Judicial Control of Local Government	378
CHAPTER XVIII. Administrative Law	401
CHAPTER XIX. Local Authorities in Litigation . .	437

INTRODUCTION

The necessity of some system of control by the Central Government over the activities of local authorities has already been adverted to : if local autonomy is not to produce a state of affairs bordering on anarchy, it must be subordinated to national interests by means devised to keep its actions within bounds. It is now necessary to consider this other side of the English system of local government.

Central control in its widest sense takes three forms, each operating in a particular manner, but bound together by the general purpose of co-ordinating the work of local authorities. Two of the forms are old and are exercised by bodies not exclusively concerned with the affairs of local government nor instituted primarily to consider its problems ; the remaining form is new and has been created expressly for this one purpose.

Legislative Control.—In the first place the supremacy of the law has meant that a system of parliamentary or legislative control has existed from the earliest times. Translated into practical terms this form of control is rendered necessary by the fact that local authorities require statutory powers to enable them to engage in almost any activity they may wish to undertake. Hence Parliament as the sovereign law-making body in the Kingdom has by its ability to confer or refuse these powers long exercised a control over the development and the functions of local government. This control is from its nature necessarily somewhat broad in operation : Parliament can determine whether new services shall be set up or new powers granted, but is unable itself to supervise the way

in which, within the legislative framework it creates, the details of administration are carried on, and has no machinery adequate for the purpose of detecting and restraining activities unauthorised by it.

Judicial Control.—To some extent these latter functions are performed by the control which the Courts of Law are enabled to exercise over local authorities. This judicial control is historically derived from the supervision which the Court of King's Bench exercised over the justices of the peace, as well in the performance of their strictly judicial, as of their administrative duties. The procedure by which this control is exercised, while it enables the Courts to compel the performance of positive duties and to provide a check upon attempts to exceed the powers which Parliament has conferred upon the local authorities, necessarily prevents them from doing more. They must accept as valid the legal powers which statute has granted, and are confined to the decision of particular cases in which it is alleged that those powers have been exceeded. They can thus exercise no effective control over the manner in which statutory powers are used : they can supervise neither the details of administration nor the framing of policy within the limits set by statute.

Administrative Control.—With the growth of the sphere of local government in the nineteenth century, a new form of control was gradually created. As Maitland said,

“ every reform of local government has hitherto meant an addition to the powers of the central government. . . . Thus two processes have been going on side by side ; on the one hand we get new organs of local government, on the other hand we get new organs of central government ” (a).

This administrative control over the details of routine action and even over the development and pursuit of policy has grown until it has become a characteristic feature of local

(a) *Constitutional History of England*, p. 498 ; see above, p. 38.

government in England : indeed with its growth it has tended not merely to supplement judicial control, but even in some cases to encroach upon the ground previously reserved as the exclusive territory of the courts.

It will now be necessary to consider in detail these three forms of central control exercised over the activities of local authorities : but the historical order in which they have been introduced above will not be followed. Parliamentary or legislative control must be dealt with first, because it serves to map out the field within which local government can have any existence. Its discussion involves two closely related matters : on the one hand how it comes about that in law the actions of local authorities are strictly confined within the powers conferred upon them by statute, and on the other hand the methods employed by Parliament in granting these powers.

In the second place, it will be convenient to deal with the administrative control exercised by Government Departments, for at the present day this forms a more complete, though as yet largely unsystematised, supervision of the actions of local authorities within the limits of their statutory powers than that exercised by the law courts.

Lastly, judicial control will call for examination. Some of the principles in accordance with which it is exercised will most conveniently be considered in connection with legislative and administrative control (*b*), and so in general its separate discussion can be confined to an examination of the actual forms of procedure by which it may be called into operation. This relegation of judicial control to the third place is justified on two grounds. In modern times its practical importance is slight as compared with legislative and administrative control, and to promote it to a position of greater importance than either of the other two forms might give a false impression of its utility in practice. In the second place, it extends not only over local authorities, but also largely over the central departments by which administrative control is exercised, and

(*b*) *E.g.* Ch. XII, The Necessity of Legislative Control ; Ch. XIV, Delegated Legislation.

so assumes in some cases the proportions of an agency capable of supervising in turn even administrative control. Hence it is desirable that the nature of administrative control should be clearly explained before the historically more ancient control exercised by the law courts can be adequately considered.

CHAPTER XII

THE NECESSITY OF LEGISLATIVE CONTROL

Necessity for Statutory Powers.—In the present chapter it is necessary to consider why it is that local authorities require statutory powers to enable them to carry on the services they provide. Two reasons, making it almost essential that powers should be given to local authorities by statute, are immediately obvious. In the first place, to finance their undertakings local authorities require to raise money by rates, and rates are simply locally imposed taxes. Hence Parliament, as the source of all taxing powers, can alone give to local authorities the right legally to make rates and the means of compelling payment. Secondly, many, if not all, of the services local authorities provide involve, for their efficient administration, some degree of interference with the proprietary or personal rights of individuals or even with the rights of the general public. For example, in order to provide a service a local authority may need to acquire land compulsorily, or to enact bye-laws restraining to some extent the liberty of action of the inhabitants in its area, or to break up highways in such a way as temporarily to impede the public right of passage. Inherently local authorities are in no more favoured position in this respect than are trading companies or private individuals : all alike can only justify interference with previously existing rights by showing that the law permits them to do so (*a*). Hence local authorities to the extent to which they require powers to interfere with individual or public rights must obtain those powers in such a form as will make them part of the law of the land. For this purpose resort must be had to Parliament,

(*a*) See below, p. 406.

which alone can freely make and alter the law, and the powers of local authorities must be statutory.

Local Authorities as Corporations.—In the third place, however, a more subtle reason confines local authorities to the activities which statute permits them to undertake.

From their nature local authorities become subject to certain general principles of law, which apply equally to all bodies falling within the same legal category. This results from the fact that local authorities are corporations. In the case of a borough it is the mayor, aldermen and burgesses who are incorporated: that is, the inhabitants of the borough form the members of the corporation, though that corporation can only act through the council (*b*). In no other case are the inhabitants of a local government area incorporated. In counties (*c*), and urban and rural districts (*d*), it is the council which is erected into a body corporate. Similarly, in rural parishes where there is a parish council, it is the council which is incorporated (*e*), while, if there is no parish council, the “representative body” of the parish forms a corporation (*f*).

Characteristics of Corporations.—This fact, that the device of incorporation is employed in connection with all local authorities, produces important consequences, for the law has developed a considerable number of rules which apply to all corporations alike, whether they are designed to act as local authorities, as educational or charitable foundations, or as trading companies. This is not the place to consider in detail the theory of corporate personality, that is, whether a corporation is a real person with a real will independent of the wills of the individuals who are for the time being its members, or whether it is a mere fiction employed only for convenience (*g*). In any case, even if we regard incorporation merely as a

(*b*) Local Government Act, 1933, §§ 17 and 129.

(*c*) *Ibid.*, § 2.

(*d*) *Ibid.*, §§ 31 and 32.

(*e*) *Ibid.*, § 48.

(*f*) *Ibid.*, § 47.

(*g*) See Maitland's Introduction to Gierke, *Political Theories of the Middle Age*; Gray, *Nature and Sources of Law*; Hallis, *Corporate Personality*.

fictitious device, we must recognise that a corporation is in the eye of the law a person, an entity capable of possessing property and other rights and of being subject to duties. Moreover the legal personality of a corporation is entirely distinct and independent from the personalities of the individuals who compose it; for instance, the members are not personally liable for the debts contracted by the corporation, nor is the corporate property liable for the debts of any of the members incurred in their personal capacities. At least then, by enabling a fluctuating group of individuals to obtain the benefit of proprietary rights and to assume the burden of duties, incorporation does form a convenience with whose aid many difficulties can be surmounted.

The leading characteristics of a corporation are frequently summed up in the phrase that it has a name, a perpetual succession and a common seal. To be a legal person, distinct from the individual human beings composing it, a corporation must obviously have a name to distinguish it, so that in entering into legal relations or in undertaking litigation it may be clear that it is the corporation itself which is acting, and not the individuals who for the time being are its members. The requirement of a common seal is likewise important in order that there may be some means of authenticating the acts of a corporation (*h*). An exception must, however, be noticed in this matter, for neither the parish council nor the "representative body" of the parish are permitted the luxury of a common seal, their acts, which would otherwise require sealing, obtaining sufficient validity from execution under the hands and seals, in the former case, of the chairman and any two members, and in the latter case of the chairman of the parish meeting and the rural district councillor elected by the parish, who together for the time being compose the "representative body" (*i*). Lastly, the characteristic of perpetual succession shortly expresses the

(*h*) *Ludlow Corporation v. Charlton* (1840) 6 M. & W. 815; 13 Digest 285, 170.

(*i*) Local Government Act, 1933, §§ 47 and 48.

fact that a corporation is an immortal person, capable of the same eternal existence however its individual members may die or change.

English law does not permit the free creation of these immortal legal persons : it recognises only two modes in which they may be created, each requiring action on the part of the Sovereign, and, according to the mode employed, it divides corporations into two classes. Viewed in this way the law classifies them as either common law or statutory corporations. Common law corporations are created either by royal charter or by prescription, the fact of having acted as a corporation from time immemorial being conclusive evidence of creation before the commencement of legal memory by a royal charter which has subsequently been lost (*j*). A few boroughs base their title to incorporation upon prescription, for instance, the Corporation of the City of London. Statutory corporations, on the other hand, as their name implies, are the creatures of Acts of Parliament.

Common Law Corporations.—It is not only as a means of indicating the particular mode of creation employed that this distinction between common law and statutory corporations is drawn, for it has important results when the powers of corporations have to be considered. In this respect common law corporations appear to be more favoured than statutory corporations (*k*). A common law corporation is recognised as being legally capable of doing anything which a natural person can do. If there are limitations upon its actions expressed in the charter creating it, nevertheless these do not prevent the corporation from validly doing the acts in question, though, if it thus infringes its charter, a *scire facias* will lie against it at the suit of the Crown to forfeit or revoke the charter (*l*). Consequently, in order to prevent this result a

(*j*) The commencement of legal memory is the year 1189, the first year of the reign of Richard I.

(*k*) See, e.g., *Baroness Wenlock v. River Dee Commissioners* (1883) 36 Ch.D. 675 n. ; affirmed in *Dom. Proc.* (1885) 10 App. Cas. 354 ; 13 Digest 367, 1002.

(*l*) *Sutton's Hospital Case* (1612) 10 Co. Rep. 1 ; 13 Digest 270, 3.

member may be entitled to sue for an injunction restraining the corporation from committing an act involving an infringement of the charter (*m*).

Statutory Corporations and the Doctrine of *ultra vires*.—Statutory corporations are, on the contrary, subject to the doctrine of *ultra vires* (*n*). They are mere creatures of the statutes creating them, and the law will not suppose that they were created for any purposes other than those which induced the Legislature to act. Consequently they have only the powers which the statutes creating them expressly confer upon them (*o*) and those which are fairly incidental to the powers expressly given (*p*). This extension, to include powers fairly incidental to those expressly conferred, does not indirectly enable statutory corporations to evade the doctrine of *ultra vires*. When the question arises whether a power is fairly incidental to those expressly given by the incorporating statute, though it must be determined reasonably, the courts will not strain the language of the statute to enable the corporation to engage in activities never contemplated by the Legislature. Thus if a company is incorporated by statute to manufacture railway vehicles, it cannot engage in the construction of railway systems (*q*). On the other hand, it has been held that the setting up of a department to undertake the provision of all the printing and stationery required by a borough council is fairly incidental to the purposes of municipal incorporation, and so not *ultra vires* (*r*).

Thus the main distinction between common law and statutory corporations lies in the application to them of the doctrine of

(*m*) *Jenkin v. Pharmaceutical Society* [1921] 1 Ch. 392; 13 Digest 359, 944.

(*n*) For the history of this doctrine, see W. I. Jennings in *A Century of Municipal Progress* (edited Laski, Jennings and Robson), pp. 418–421.

(*o*) *Ashbury Railway Carriage Co. v. Riche* (1875) L.R. 7 H.L. 653; 13 Digest 354, 922.

(*p*) *A.-G. v. Great Eastern Railway Co.* (1880) 5 App. Cas. 473; 13 Digest 356, 932.

(*q*) *Ashbury Railway Carriage Co. v. Riche* (1875) L.R. 7 H.L. 653; 13 Digest 354, 922.

(*r*) *A.-G. v. Smethwick Corporation* [1932] 1 Ch. 562; Digest Supp.

ultra vires. A common law corporation can legally (s) do any act, but in the case of an act expressly prohibited by the charter creating it, only at the risk of proceedings being taken for its destruction. Even in the case of such a prohibited act, if the corporation nevertheless determines to do it, the act is valid and is recognised by the law as being the act of the corporation. A statutory corporation, on the other hand, cannot do an *ultra vires* act: if it purports to do so, the act is invalid: the law will not recognise it as being done by the corporation. This is not a mere matter of the power of the majority to bind the dissentient minority of members: even if all the members agree, a statutory corporation cannot act *ultra vires*, because to do so is entirely beyond its capacity.

The effects of this doctrine of *ultra vires*, in its application to statutory corporations, are to be seen in several branches of the law. Because an *ultra vires* act is invalid, a contract made by a statutory corporation in a matter which is *ultra vires* is void (t). Again, a statutory corporation cannot apply any of its property in an *ultra vires* undertaking, and in the case of statutory local authorities the district auditor's power to disallow and surcharge illegal expenditure (u), as well as remedies available to other interested persons by appeal to the courts for an injunction (v), afford means of enforcing this rule.

Local Authorities and the Doctrine of *ultra vires*.—

This brief digression into the general principles of law governing the powers of corporations has been necessary in order that the application of these principles to local authorities may become clear. In this matter we must notice that some local authorities are statutory, and some are common law corporations. County councils, district councils and parish councils are all directly incorporated by Acts of Parliament (w)

(s) That is, of course, in the absence of an injunction having been obtained to restrain the commission of the act in question.

(t) See below, p. 448. As to the effect of the doctrine in tort, see below, p. 438.

(u) See above, p. 203.

(v) See below, p. 379.

(w) I.e. the Local Government Acts, 1888 and 1894; see now Local Government Act, 1933, §§ 2, 31, 32 and 48. *London County Council v. A.-G.* [1902] A.C. 165; 13 Digest 366, 994.

and are therefore statutory corporations directly subject in all its implications to the doctrine of *ultra vires*. Legally they can only do what statutes have given them power to do.

Municipal Corporations.—Municipal corporations are, however, in a different category, and the principles applying to them are more complex. Boroughs are incorporated by royal charter (x), and so are classed as common law corporations which *prima facie* should be entirely free from the direct application of the doctrine of *ultra vires*. In fact, however, legislation expressly imposes limitations on the powers they would otherwise possess, and so they form, as it were, a hybrid class of common law corporations, limited in some of their actions by express statutory regulation. It has been judicially decided that corporations in this position are not permitted to infringe the statutory regulations and limitations which have been imposed upon them: to that extent they, like statutory corporations, are directly subject to the doctrine of *ultra vires* so as to enable proceedings to be taken to restrain them from infringing the limitations imposed (y). But in respect of all matters not expressly prohibited by statute these corporations retain the characteristics of common law corporations free from the doctrine of *ultra vires* (z). Therefore it would appear at first sight that municipal corporations, except in the matters expressly regulated for them by statute, could freely engage in any activities they chose, and would not have to rely upon statutory powers being conferred upon them before deciding to start some novel service or undertaking.

Though theoretically this is true two considerations in practice prevent any such autonomy from being exercised by borough councils, and almost subject them to the operation of the doctrine of *ultra vires* as rigorously as if they were acting as the executive organs of purely statutory corporations. In

(x) Local Government Act, 1933, § 129, and contrast the language of § 17 with that used in the sections incorporating other local authorities.

(y) *A.-G. v. Leeds Corporation* [1929] 2 Ch. 291, pp. 295-6; Digest Supp.

(z) *A.-G. v. Manchester Corporation* [1906] 1 Ch. 643; 13 Digest 362, 972; *Bonanza Creek Gold Mining Co., Ltd. v. R.* [1916] 1 A.C. 566, p. 582; 13 Digest 357, 936.

the first place, as has already been said, the maintenance of local government services almost invariably involves the interference with the personal or the proprietary rights of individuals in the area of administration, or with the rights of the general public. But such interference with previously existing rights can only be justified if it is founded upon powers expressly given by statute, and local authorities are in no better position in this respect than individual citizens or trading companies.

Statutory Regulation of Municipal Corporations.—

Secondly, the very matters, in which legislation regulates the powers of borough councils, are vital to the prosecution by them of almost every activity, for the Local Government Act, 1933 (*a*), very carefully limits their powers in the fundamental matters of finance and property. This fact practically confines the undertakings carried on by municipal corporations to those which they are expressly empowered by statute to engage in, and so in effect discounts the results which at first sight would appear to flow from the fact that they are created by royal charter.

This must not be taken to mean that, because the financial powers of municipal corporations are limited by statute, their councils are as closely subjected to the doctrine of *ultra vires* as are statutory corporations. The financial check upon municipal corporations is only indirect: so long as neither expenditure nor the application of corporate property is involved, they may, simply by virtue of their chartered existence, validly do acts which they are not expressly or impliedly empowered to do by statute (*b*). Similarly contracts entered into by them beyond their statutory powers are neither *ultra vires* nor void (*c*). But expenditure or the application of corporate property upon objects which have received no statutory sanction is illegal.

(*a*) §§ 185-187, formerly the Municipal Corporations Act, 1882, §§ 139-143 and 5th Schd.

(*b*) *A.-G. v. Manchester Corporation* [1906] 1 Ch. 643, p. 656-7; 13 Digest 362, 972.

(*c*) *Newcastle-upon-Tyne Corporation v. A.-G.* [1892] A.C. 568; 13 Digest 363, 974.

General Rate Fund of the Borough.—The provisions of the Local Government Act, 1933, which produce this latter result are those which, coming from the Municipal Corporations Act of 1835, were designed to prevent corruption and the misapplication of corporate property, which in the period preceding the earlier Act had characterised many municipal corporations. The Act provides that all receipts, including the income derived from corporate land, shall be paid into the general rate fund of the borough (*d*), which is expressly charged with certain payments (*e*). These and certain other payments out of the fund may lawfully be paid by the treasurer without the necessity of an order of the council: these include payments made in pursuance of the specific requirements of any enactment, or of an order of a competent judicial authority, as well as the remuneration of certain officers and persons specified in the Act. All other payments may only be made under an order of the council, which must be signed by three members of the council and countersigned by the town clerk, and, we have already seen, any person aggrieved by such an order of the council may challenge its validity by an appeal to the High Court (*f*).

Obviously all the payments out of the general rate fund of a borough which may be made without an order of the council are permitted by the express terms of a statute, whether it be by the Municipal Corporations Act, 1882, the Local Government Act, 1933, or some other Act. In respect of payments out of the fund which can only be made on an order of the council, this requirement of statutory authorisation is not at first sight apparent: nor does it become more obvious when it is noticed that the High Court, on an appeal to it against such an order, "may give such directions in the matter as they think proper" (*g*). This seems to make the legality of payments out of the fund, otherwise than in pursuance of some specific statutory authorisation, depend purely upon the

(*d*) Local Government Act, 1933, § 185.

(*e*) Municipal Corporations Act, 1882, § 140 and 5th Schd., amended by Local Government Act, 1933, 11th Schd.

(*f*) Local Government Act, 1933, § 187. See above, p. 198. (*g*) *Ibid.*

discretion of judges (*h*). But in fact the courts have so interpreted these provisions as only to permit the general rate fund of a borough to be used in making payments authorised by statute or fairly incidental to purposes in respect of which statutory powers exist.

The general rate fund of a borough is composed of moneys coming from two sources. The Act envisages that in the first place all receipts, including the income of corporate land, shall be paid into the fund, and that, in so far as this source of income is insufficient, the borough council shall levy a rate (*i*). Almost immediately after the passing of the Municipal Corporations Act, 1835, by which these provisions were first introduced, it was held by the courts that the funds of municipal corporations were impressed with a public trust to be exercised by the councils only in the manner and for the purpose prescribed by the Act (*j*). This effectively prevents the use of that part of the general rate fund, at least, which is composed of the income of property, otherwise than for purposes authorised by statute. But it was soon held more specifically that the character of trust funds equally applied to moneys raised by rate, and that in a proper case the courts could interfere to prevent the improper use of the power of rating (*k*). It follows that no rate may lawfully be made for the purpose of raising money to be devoted to an object which the borough council is not expressly or by implication empowered by statute to pursue (*l*).

(*h*) Cf. *R. v. Prest* (1850) 16 Q.B. 32, p. 43; 33 Digest 84, 542.

(*i*) Local Government Act, 1933, §§ 185 and 186. This was expressed more clearly by the Municipal Corporations Act, 1882, § 144. In this it reproduced the language of the Municipal Corporations Act, 1835, when the increase in the activities of borough councils had not made it impossible for them to carry out their functions without resort to rating powers.

(*j*) *A.-G. v. Aspinall* (1837) 2 My. and Cr. 613; 33 Digest 80, 515; *Parr v. A.-G.* (1842) 8 Cl. & Fin. 409; 33 Digest 87, 561.

(*k*) *A.-G. v. Lichfield Corporation* (1848) 11 Beav. 120; 33 Digest 87, 562.

(*l*) *A.-G. v. Newcastle-upon-Tyne Corporation* (1889) 23 Q.B.D. 492; [1892] A.C. 568; 33 Digest 85, 550. The wording of § 185 of the Local Government Act, 1933, is not so emphatic as the now repealed provisions of the Municipal Corporations Act, 1882, § 140 (3), which expressly forbade other payments to be made out of the fund; and in *A.-G. v. Leicester Corporation*, [1943] Ch. 86; [1943] 1 All E.R. 146 it was held that the repeal of the Municipal Corporations Act, 1882, § 140 (2), (3) and (4) by the Local Government Act, 1933, did effect a modification in the former position.

Application of Surplus.—In this way the use of the income arising from corporate property and the use of the power of rating—which, being a power to impose a local tax, requires express statutory authority—are both strictly confined. But a somewhat greater latitude is permitted to borough councils in the disposal of any surplus remaining in the general rate fund after the expenses properly payable out of it have been met, for the Act empowers the council to apply such a surplus “for the public benefit of the inhabitants and improvement of the borough” (*m*). These provisions, authorising the use of a surplus in the fund, give some loop-hole to the borough council, enabling it to escape from the indirect application of the *ultra vires* doctrine which the statutory regulation of the financial arrangements of municipal corporations involves. But this must not be exaggerated, for in practice very little use can be made of these provisions. Not only have the courts narrowly construed the words “public benefit of the inhabitants and improvement of the borough,” but they have held that the surplus which can be used in this way must be a casual one : it is not permissible for a borough council to make rates in order to create a surplus, and then to claim that this surplus, deliberately created, may be utilised almost at the discretion of the council (*n*).

In practice, therefore, boroughs, though common law corporations and in this respect different from other local authorities, are practically as rigorously limited in the activities they can undertake—at any rate where, as in the majority of cases, expenditure is involved—as are the statutory councils of counties, districts and parishes. All local authorities, therefore, are in substantially the same position, so far as the activities they may engage in are concerned. In all cases they can only act when statute has given them powers to do so, and any attempt to act *ultra vires* can be frustrated by an appeal to the courts (*o*).

(*m*) Local Government Act, 1933, § 185.

(*n*) *Newcastle-upon-Tyne Corporation v. A.-G.* [1892] A.C. 568 ; 33 Digest 85, 550.

(*o*) See below, Ch. XVII, as to the methods which can be adopted for this purpose.

CHAPTER XIII

THE ACQUISITION OF POWERS

Grants of Powers by Parliament.—In the previous chapter we have seen that all local authorities, other than municipal corporations, because they are statutory corporations, can only engage in activities which they are expressly or impliedly empowered to do by Act of Parliament, and that municipal corporations, though created by royal charter, are, because of the statutory regulation of their financial dealings, in little better position. We must now consider the various ways in which the powers of local authorities may be derived from Parliament. Acts of Parliament are the most obvious as well as the most direct means of conferring powers, but as the work of Parliament became more crowded a progressive system of delegation has grown up, under which Parliament has conferred on other bodies or persons the power to authorise local authorities to undertake new activities. This delegation does not conflict with the fundamental principle that the powers of local authorities must be derived from Parliament, for the process merely involves two steps in their derivation instead of one. We must consider therefore, first, the forms in which Parliament itself directly confers powers and, secondly, the system of delegated legislation.

1. General Acts.—Many powers are granted to local authorities by general public Acts of Parliament—as for instance such legislation as the Public Health Acts, 1875 and 1936, the Education Act, 1944, and the Poor Law Act, 1930—each of which sets up or regulates the administration of a whole local government service. The test of a general Act lies in the

generality of its application : it forms a part of the general law of the land and applies throughout the country (*a*). In its enactment it follows the ordinary procedure of Parliament. If we imagine it to start in the House of Commons, it passes through a formal first reading ; it is then read a second time, when its general principle is approved ; it is next committed either to a select or a standing committee, or, where the measure is of an important or controversial nature or is so unanimously supported as to need no effective committee stage, to a committee of the whole House (*b*). In committee the details of the Bill are considered clause by clause, and when this stage is completed the Bill is reported to the House. After the report stage, the Bill is read a third time, and then sent up to the House of Lords, where it goes through similar stages (*c*). Lastly, the Bill receives the Royal Assent, and becomes thereby an Act of Parliament.

In fact, since in modern days the allocation of the time of the House of Commons is in the hands of the Government, it follows that nearly all important Bills which are ultimately to become statutes must be introduced by a Minister as Government measures, or at least taken over and supported by the Government ; but occasional Bills of a non-controversial nature manage to obtain a passage through the Houses sponsored only by private members.

Obligatory or permissive.—In their effect on the powers of local authorities the provisions of general statutes may take any of three forms. In the first place they may be obligatory in their terms : they may not be content solely to empower local authorities to do certain things, but may go further and compel the exercise of the powers they confer. This form

(*a*) See *Richards v. Easto* (1846) 15 M. & W. 244 ; 42 Digest 602, 16 ; *R. v. London County Council* [1893] 2 Q.B. 454 ; 42 Digest 602, 22.

(*b*) During war-time the practice of committing Bills to a select or a standing committee was suspended, though this procedure has now ended.

(*c*) This must, of course, be read subject to the provisions of the Parliament Act, 1911, which under certain conditions permit a Bill to be presented to the King for assent without the necessity of being passed by the House of Lords. See on the whole process, Anson, *Law and Custom of the Constitution*, vol. I.

of legislation is resorted to when it is desired to introduce a new service throughout the country, and it is frequently accompanied in modern times by provisions requiring the local authorities to which the Act applies to set up committees to deal with the new service, and authorising a grant in aid. Secondly, the Act may merely be permissive, conferring new powers on local authorities but leaving it to their discretion whether they will exercise them or not. Permissive legislation of this sort is nowadays usually confined to Acts dealing with existing services and making particular reforms which experience has shown to be desirable.

Adoptive Acts.—Thirdly, general Acts may take the form of adoptive legislation : the Act directly gives only one power to the local authorities to which it applies, and that is the power to adopt the Act in the manner it prescribes. In other words, the Act directly confers no obligatory, nor even permissive powers, for it only comes into force in respect of those local authorities which take the prescribed steps to make the Act apply to themselves. Adoptive Acts form a useful means of providing elasticity and experiment, for they enable those authorities, which feel it desirable to do so, to undertake the provision of services which popular opinion has not yet regarded as essential for all authorities of the same class, and they permit experience to be gained of the working of these services in particular areas. In fact some of the present local government services were first introduced by adoptive Acts, and, after their effectiveness had been proved in isolated areas, they were made obligatory over the whole country.

This device of the adoptive Act was first introduced in the early nineteenth century, its purpose originally being rather to permit the inhabitants of an area to set up an *ad hoc* local authority than to allow an existing general authority to obtain new powers. Now, however, it is the local authority which alone can adopt these Acts. Thus the Parochial Adoptive Acts have been amended so as to permit the parish meeting in a rural parish to adopt powers for the provision of street

lighting, libraries and museums (*d*). Many of the provisions of the Public Health Acts of 1890, 1907 and 1925 were similarly adoptive, the procedure necessary to bring them into force varying considerably. The Local Government and Public Health Consolidation Committee (*e*), however, reported against continuing the adoptive principle in general, and in those parts of the Acts which were embodied in the Public Health Act of 1936 adoption has been omitted, the powers being framed as permissive. Similarly the adoptive Local Government and Other Officers Superannuation Act, 1922, has been replaced by the compulsory Local Government Superannuation Act, 1937.

2. Local Acts.—To be contrasted with general Acts are the local Acts by which Parliament confers powers on particular authorities. These local Acts differ from public ones both in the extent of their application and the procedure adopted in their enactment. They are of vast importance in local government, for there is scarcely a local authority of any magnitude which has not obtained from Parliament in this way a whole code of law and a whole scheme of powers peculiar to itself.

The principle of the English Constitution, which has been called the Rule, or Supremacy of Law (*f*), requires that every interference with the personal or proprietary rights of any individual subject shall only be justifiable by showing that the law itself sanctions such a course. Power to interfere with the rights of others must, in other words, be cast in the form of law. The maintenance of local government services generally involves some interference with previously existing private rights, and consequently powers to maintain such services must be granted in a manner which makes them part of the law. The English Constitution, by the unbounded sovereignty

(*d*) Local Government Act, 1894, § 7; Local Government Act, 1933, § 305; amended by Public Health Act, 1936, § 230 and 3rd Schd.

(*e*) Cmd. 5059/1936.

(*f*) See Dicey, *Introduction to the Study of Constitutional Law*, Ch. IV, below, p. 403.

which it reposes in Parliament, provides a machine able to effect this result, and the sovereignty of Parliament proves its existence, not only in its ability to undertake great measures of law-making, but also in its power to deal with small and isolated matters of purely local importance.

Parliament is therefore able to give legal powers, not only to all local authorities in general, but to any one local authority in particular in order to suit the special circumstances applicable in its own area. In private Bill legislation, as well as in the passing of many general Acts, Parliament is not only acting as a legislator simply engaged in making law, but is in reality engaging in the work of administration. In the case of private Acts, however, a further complication occurs : they are in the nature of *privilegia*, special alterations of the law in favour of the individuals or corporations who promote them. In passing them Parliament must therefore also take care to see that they will not involve any conflict with national policy and interests or any injustice to private individuals. This is reflected in the special procedure adopted in Parliament for dealing with private Bills, and leads to the two Houses acting in a semi-judicial manner in considering their provisions.

Power to promote or oppose Legislation.—Before discussing the details of private Bill legislation, we must first consider to what extent local authorities have power to promote or oppose Bills in Parliament, for if no powers in this respect were conferred upon them, it would be *ultra vires* for them to do so, or at any rate for them to expend any money for the purpose.

As far as statutory corporations were concerned, it was held in the middle of the nineteenth century that a statutory trading company had no inherent power to use its property for the promotion of legislation to extend its powers (*g*), and similar decisions were given in respect of improvement commissioners

with powers of rating set up by a local Act (*h*), a rural sanitary authority under the Public Health Act, 1875 (*i*), and an urban district council (*j*).

When the same question arose in connection with a borough, the matter depended upon the provisions of the Municipal Corporations Act, 1882, prescribing the purposes for which the borough fund might be used (*k*). In the light of these provisions it was held in *R. v. Mayor of Sheffield* (*l*) that a municipal corporation had no power to charge to the borough fund the costs even of opposing a Bill in Parliament (*m*); though if there was a surplus in that fund, it might possibly be used for this purpose (*n*), provided that in so doing the benefit of the inhabitants would be promoted (*o*).

To sum up these provisions, statutory corporations could not promote Bills in Parliament and municipal corporations could, possibly, only do so if they could raise the necessary money by private subscription so as to avoid the use of the borough fund. Opposition to legislation was only open in general to boroughs and then in cases where the continued existence of the corporation was threatened. A surplus might be used in promoting or opposing legislation, but only so far as the inhabitants would be benefited. In general, therefore, to promote or oppose legislation itself requires statutory power, and this has now been provided in certain cases and subject to certain conditions; but the above principles may still be of practical importance where it is desired to resort to such proceedings without satisfying the conditions imposed upon the exercise of the statutory power.

(*h*) *A.-G. v. Andrews* (1850) 2 Mac. & G. 225; 13 Digest 361, 962.

(*i*) *Cleverton v. St. Germain's Union Rural Sanitary Authority* (1886) 56 L.J. Q.B. 83; 33 Digest 101, 687.

(*j*) *A.-G. v. Rickmansworth Urban District Council* (1902) 86 L.T. 521; 33 Digest 41, 222.

(*k*) See above, p. 290.
(*l*) (1871) L.R. 6 Q.B. 652; 33 Digest 86, 554; *A.-G. v. Swansea Corporation* [1898] 1 Ch. 602; 33 Digest 82, 533.

(*m*) Unless its own existence was at stake or its property or rights were threatened: *A.-G. v. Brecon Corporation* (1878) 10 Ch.D. 204; 33 Digest 82, 530.

(*n*) Under the Municipal Corporations Act, 1882, § 143, now Local Government Act, 1933, § 185.

(*o*) Cf. *R. v. Mayor of Sheffield* (1871) L.R. 6 Q.B. 652; 33 Digest 86, 554.

The decision in *R. v. Mayor of Sheffield* (*p*) led to the passing of the Borough Funds Act, 1872, subsequently amended by the Borough Funds Act, 1903, giving to borough and urban district councils the power to charge their funds with the costs of promoting and opposing Bills in Parliament for the furtherance or protection of the interests of the inhabitants of their areas, and power to promote and oppose Bills was subsequently conferred on county councils (*q*) and rural district councils (*r*). Parish councils and parish meetings still have no statutory powers in this matter.

The Local Government Act, 1933, in consolidating these provisions, perhaps through a failure to realise the different legal positions of boroughs on the one hand and statutory local authorities on the other hand (*s*), confers in express terms on all alike a power to promote and oppose Bills and to defray the costs of so doing ; but at the same time it preserves any rights of a local authority to proceed in this matter otherwise than in accordance with the provisions of the Act (*t*). The result is that the law, with minor modifications, remains as it was.

Formalities.—A local authority then (*u*) has power to promote and oppose Bills in Parliament (*v*), but the Act lays down stringent conditions which must be satisfied before these powers may be exercised (*w*). In the first place a resolution to oppose or promote a Bill must be passed by a majority of the whole council of the local authority in question at a meeting summoned after ten days' public notice has been given. If the resolution relates to the opposition to a Bill this single formality suffices, for the Local Government Act

(*p*) (1871) L.R. 6 Q.B. 652 ; 33 Digest 86, 554.

(*q*) Local Government Act, 1888, § 15 ; County Councils (Bills in Parliament) Act, 1903.

(*r*) Local Government Act, 1929, § 55. (*s*) See above, Ch. XII.

(*t*) Local Government Act, 1933, §§ 253 and 258.

(*u*) Other than a parish council or parish meeting.

(*v*) Local Government Act, 1933, § 253.

(*w*) Formerly these conditions did not apply where the objects of the Bill could be obtained by provisional order, Borough Funds Act, 1872, § 10. But the Local Government Act, 1933, 11th Schd., repealed this exception without re-enacting it.

of 1933 in this case considerably simplified the procedure which formerly obtained, and which required, as well in respect of opposition as of promotion, that a further resolution should be passed. A resolution to promote a Bill is, however, only the first step. The resolution must be published in the local press and sent to the Minister of Health for his approval. Any local government elector of the area of the promoters may send an objection to the Minister, or the latter, before deciding whether to approve the resolution, may order the holding of a local inquiry (x).

When these steps have been successfully completed the council may proceed to deposit the Bill in Parliament, but, having done so, it may take no further step in the matter until its action has been confirmed in the manner prescribed by the Act. The deposit of the Bill must in all cases be confirmed by a second resolution of the council, similar in its requirements as to form to the first resolution which originated the whole process (y).

When this second resolution has been passed, in the case of county councils and rural district councils, the conditions required to be fulfilled by the Act have been completed, and the promotion of the Bill in Parliament may proceed unhampered, the costs being lawfully payable out of the county fund or the general rate fund of the district (z). But in the case of boroughs and urban districts a further step must yet be taken (a). In these cases the local government electors of the area must also approve. The procedure for obtaining their approval requires the advertisement of notices of the deposit of the Bill and of a meeting of local government electors, commonly spoken of as a "town's meeting," though

(x) Local Government Act, 1933, § 290. In practice the Minister does not refuse his approval if the prescribed procedure has been duly followed.

(y) This confirming meeting must be held as soon as may be after the expiration of fourteen days after the deposit of the Bill.

(z) Local Government Act, 1933, §§ 254 and 255.

(a) There is an exception to this. The fourth step is not required for a Bill promoted by a borough and intended solely to constitute it a county borough, nor for one promoted by a county borough and designed only to extend its boundaries.

that expression is not found in the statute. At that meeting all the electors are entitled to be present, and the Bill must be explained and a resolution to approve it put (*b*). The decision of the town's meeting is final, unless a poll of electors is demanded, either by one hundred electors or one-twentieth of their total number (whichever number is the less) (*c*), or by the council, if the decision of the meeting is adverse to its wishes. A poll of the local government electors of the area is then held, and, unless this is favourable to the promotion of the legislation in question, the matter can go no further, and the Bill must be withdrawn (*d*).

Town's Meetings.—These provisions are open to serious criticism. It may be well to require special formalities to be observed before the council of a local authority embarks upon the course of an appeal to Parliament, expensive both in its actual conduct and in the obligations which, if successful, it may well impose : but the requirement of so many stages of decision, objection, confirmation and approval may seem unnecessary, when it is remembered that the very persons who are thus limited in their actions are the representatives of the inhabitants, elected presumably because they inspired the confidence of their constituents. In any event the procedure of the town's meeting can only be described as unsatisfactory. It has been wisely discarded in the case of county councils and rural district councils, on the ground that it would be impossible in such scattered areas to hold meetings of the electors which would be at all representative. But for different reasons a similar objection to its retention in boroughs and urban districts may be suggested. Simply because people live close together it does not follow that they can all be congregated into one meeting. In fact in few, if any, large boroughs or urban

(*b*) The resolution need not approve the whole Bill. It may be put to the meeting in parts, and some parts may be approved while other parts are rejected.

(*c*) The demand must be in writing and made to the mayor or chairman within seven days.

(*d*) Local Government Act, 1933, § 255 and 9th Schd.

districts would it be physically possible to hold a town's meeting at which all, or even a majority of the electors could be present, and this fact may reduce the meeting to a farce, and encourage the council, or any faction sufficiently interested, to pack the meeting with their own supporters. It has of course been argued that the electors should be given an opportunity of directly expressing their opinion on such an exceptional matter as the promotion of a Bill in Parliament, which may easily have been outside their contemplation when they chose their representatives, and that the expense of a poll, when there is no really effective opposition, should be avoided. Viewed in this light, it is sometimes said that the town's meeting does provide a means of testing whether there is such a strong feeling for or against the proposed Bill as would justify the holding of a poll; but even if that were so, it might be wished that some more effective way of doing this could be devised.

Private Bill Legislation.—Having dealt with these stages preliminary to the actual promotion of a private Bill, we can now consider the procedure adopted in Parliament when engaged in private Bill legislation. This procedure is governed by the Standing Orders of each House, which form codes prescribing the steps necessary to be taken, and which are largely designed to ensure that the sovereignty of Parliament shall not be employed in the interests of any individual or corporation without there being given to all persons, who may be affected thereby, an adequate opportunity to oppose the measure (*e*).

Deposit of Bill.—The first step is for the promoters to deposit a petition together with a copy of their proposed Bill in the Committee and Private Bill Office, and a copy of the Bill in the Office of the Clerk of the Parliaments, which corre-

(*e*) The Standing Orders differ slightly in the two Houses. We assume that the Bill, which has been drafted by the Parliamentary Agents of the promoters, is to originate in the House of Commons, and notice the differences between the procedure in that House and in the Lords as they occur.

sponds, in the House of Lords, to the Committee and Private Bill Office of the Commons. This step, which actually starts the process of private Bill legislation (f), must be taken before a prescribed date in the month of November in the year preceding that in which it is hoped to obtain the passage of the Bill. The Standing Orders further require that notices must also be given to persons affected by the proposed Bill, public advertisements be published in the local press, and copies of the Bill be sent to Government Departments likely to be interested in its subject-matter.

Compliance with Standing Orders.—When the petitions together with copies of the private Bills which are being promoted during the session have all been deposited, the first question which presents itself for decision is whether Standing Orders have been duly complied with in each case. As we have seen, these Standing Orders prescribe steps to be taken designed to give the utmost publicity to the promoters' intentions, so that persons interested may be given a proper opportunity to consider their position and decide whether to oppose the Bill. To be effective these provisions must be enforced, and for this reason interested parties are empowered to present memorials to the Committee and Private Bill Office in any case in which they can allege that Standing Orders have not been complied with. Two Examiners, one appointed by each House, undertake this work; and on the eighteenth of December commence the examination of all petitions to ascertain that there has been due compliance with Standing Orders. The promoters of a Bill must appear at this examination, upon pain of having their petition struck out; for an Examiner scrutinises every petition and not only those in respect of which memorials have been deposited by parties alleging a failure to comply with Standing Orders. If there is any opposition at this stage, both promoters and opponents

(f) Except in those cases where the Bill seeks to authorise the construction of works or the compulsory acquisition of land, in which case plans and sections, and a book of reference are deposited a week before the deposit of the Bill.

are heard, and when the examination is complete the petition is endorsed by the Examiner. If the Examiner finds that Standing Orders have been complied with the Bill proceeds on its way to the next stage. If, on the other hand, he finds that Standing Orders have in any respect not been complied with, the Examiner has no power to strike out the petition ; he then reports to both Houses the particulars in which there has been a failure to comply, and it is then for the Houses to decide what shall be done in the circumstances. A Bill which has failed to comply with Standing Orders is not necessarily disqualified from further consideration ; it is referred to the Standing Orders Committee of the House of Lords and to the Select Committee on Standing Orders in the House of Commons and these committees consider the Examiner's report and decide whether in the particular case Standing Orders shall be dispensed with.

Allocation of Bills between the two Houses.—Assuming that the promoters have successfully negotiated this stage, either by showing that Standing Orders have been duly complied with or by obtaining dispensation, the question arises in which House the Bill shall originate. This is not a matter for the promoters, but is determined in accordance with the convenience of the Houses. On or before the eighth of January a meeting takes place between the Chairman of Committees representing the House of Lords and the Chairman of Ways and Means (g) on behalf of the House of Commons, and they determine the allocation of pending Bills between the two Houses.

First Reading.—In whichever House the Bill commences, the procedure to be followed is approximately the same. The first reading of private Bills is purely formal, and is taken by laying the Bill on the table of the House. After passing this

(g) Or the Counsel to the Chairman of Committees and to the Speaker. In practice this meeting often takes place in the preceding December, and always before the meetings of the Standing Orders Committees previously mentioned.

ordeal, the Bill is returned to the Committee and Private Bill Office, where it is again scrutinised to make sure that in point of form it complies with Standing Orders.

Second Reading.—The second reading of a private Bill is usually formal, but unlike the first reading it gives some opportunity for criticism. The second reading is formally moved and usually passes without comment. It may, however, be opposed, in which case the House will have to decide whether to give the Bill a passage. In the case of a public Bill, the second reading affirms the general principle of the Bill. No such positive approval is given in the case of a private Bill, for if it passes the second reading the House only affirms the principle of the Bill conditionally upon the reasons for passing the Bill being proved in Committee.

Committee Stage.—After the second reading the Bill is committed, and this committee stage is at once the most important and the most interesting in the whole process of private Bill legislation. To understand it we must note that, while the previous stages are being passed, petitions in opposition to the Bill may have been presented. Such petitions must be deposited, if the Bill originated in the House of Commons, not later than the thirtieth of January, and, if in the House of Lords, not later than the sixth of February.

Locus standi.—The first thing which now calls for decision in the case of an opposed Bill is the *locus standi* of the opponents; that is, the right of the opponents to contest the passage of the Bill. Standing Orders give many examples of what is a sufficient *locus standi*; but the lists contained in them are not intended to be exhaustive: generally a sufficient *locus standi* may be shown to exist when the opponent will be affected by the proposals contained in the Bill either in his interest or property. If the opponents' *locus standi* is disputed by the promoters, the matter must be decided before opposition may proceed. In the House of Commons the dispute is referred

to the Court of Referees on Private Bills (*h*) and counsel are heard in support of the parties. In the House of Lords objections to the *locus standi* of petitioners are heard and decisions are given by the Committee, to which the Bill stands referred, immediately after the commencement of the hearing, and before the promoters' case is gone into in detail.

(i) **Opposed Bills.**—The Bill is now ready for the committee stage, and the procedure adopted may take any one of three forms. In the first place the Bill may be opposed, in which case the Committee of Selection allots it to an opposed Committee (*i*). The promoters must first “prove the preamble” of the Bill. This is the most important step, for if the preamble is held to be proved the general principle of the Bill is affirmed. For this purpose evidence is given before the Committee on behalf both of the promoters and opponents; the parties are represented by counsel; and the whole procedure closely resembles that of a court of law. The adoption of this method of legislating clearly shows the quasi-judicial aspect of private Bill legislation: Parliament, though possessed of sovereign power and able to alter the law at its will, refuses to grant any concession to private individuals or corporations without hearing the objections of persons likely to be affected and weighing them judicially in the balance of convenience and substantial justice: indeed, so far has the judicial element entered into the procedure, that a body of “case law” has grown up, and counsel freely cite precedents from the previous decisions of parliamentary Committees in an attempt to prove that the Bill in question should be passed or rejected.

(ii) **Unopposed Bills.**—Secondly, if a Bill is not opposed, it is referred to the Committee on Unopposed Bills (*j*); but it is still incumbent upon the promoters to prove the preamble,

(*h*) Consisting of the Chairman and Deputy Chairman of Ways and Means and seven members appointed by the Speaker.

(*i*) Consisting in the House of Commons of four members, and in the House of Lords of five peers.

(*j*) Consisting of five members in the Commons, and of the Lord Chairman of Committees “and such lords as think fit to attend” in the House of Lords.

for it was upon this condition alone that the House, by giving the Bill a second reading, approved its general principle. For this purpose the promoters must at least produce formal proof of the expediency of the proposed measure, though the absence of opponents necessarily makes the procedure simpler and less litigious in character. In these cases the promoters are not represented by counsel, their Parliamentary Agent appearing before the Committee to conduct their case.

(iii) **Unopposed Bills treated as opposed.**—Thirdly, in certain special cases, though the Bill is not opposed, it may yet raise controversial issues which require more careful consideration than can be given in proceedings before an unopposed Committee. To meet such contingencies Standing Orders permit even an unopposed Bill to be referred to an opposed Committee where the promoters will be put to strict proof of their preamble. Standing Orders give an absolute discretion to the Chairman of Ways and Means in the House of Commons and to the Lord Chairman of Committees in the House of Lords in deciding whether an unopposed Bill shall thus be treated as opposed, and, where this step is taken, the promoters are represented before the Committee by counsel.

If the preamble is successfully proved, the Committee considers the Bill clause by clause to see that none of its provisions goes beyond the general principle or is otherwise objectionable. Opponents may again challenge the necessity or desirability of the powers sought or may seek the insertion of "saving clauses" in their favour (*k*). Further to assist it in fulfilling its task the Committee has before it the reports of Government Departments interested in the subject-matter of the Bill, drawing attention to any undesirable, unusual, or unnecessary provisions contained in it.

Report and Third Reading.—With any alterations made by the Committee the Bill is then reported to the House. In

(*k*) In practice of course, before the committee stage, some possible opponents may be disposed of by the promoters agreeing to modifications or the insertion of saving clauses.

the House of Commons (*l*) if the Bill has been amended in Committee, but not otherwise, it is next “considered” as so amended, before it is read a third time, which latter stage completes its passage through the first House.

Relations between the two Houses.—The Bill in due course proceeds to the other House, where a similar series of stages—first and second readings, committee stage, report and third reading—have to be gone through. Opponents who have been unsuccessful in the first House may petition against the Bill and be heard before the Committee in the second House. If any alterations are made in the Bill by the second House it must, when it has passed third reading, be returned to the House in which it originated for consideration and approval. Theoretically it is possible for the House of origin to object to amendments made by the second House ; but in practice such a conflict between the two Houses in the case of a private Bill is extremely rare. This possibility is in any case limited to amendments, by the rule that a clause struck out in the first House cannot be restored or considered in the second House.

Royal Assent.—When a Bill has passed through all its stages in both Houses, and the amendments, if any, made in the second House have been approved by the House of origin, the Bill awaits the Royal Assent. In the case of a private Bill this is given in the form of words “*soit fait comme il est désiré*,” and the Bill then becomes an Act of Parliament.

Nature of Private Bill Legislation.—In the procedure of private Bill legislation it can be clearly seen that the principle of the “separation of powers,” which, as a doctrine of constitutional theory, requires legislative, executive and judicial functions to be kept sharply distinct, is to some extent disregarded. The actual enactment of a local or private Act is clearly legislative ; the Rule of Law requires every alteration of the ordinary law of the land to be itself in the form of law,

(*l*) But not in the House of Lords.

and the sovereignty of Parliament alone can be used for this purpose. But in its passage, especially in the committee stage, judicial, or at least quasi-judicial functions are exercised. The Committee not only weighs the benefits to be derived by the promoters against the public interest involved, but also holds the scale of justice as between the promoters and other private interests, and in doing so judicial forms are almost necessarily employed. But, lastly, at any rate where a local authority is the promoter, the work of Parliament is essentially administrative. Because of the requirements of the Rule of Law, it is performing, in the guise of law making, work which fundamentally falls under the head of administration: it is conferring powers, though the English Constitution requires this to be done in the form of making law. Private Bill legislation in this way enables Parliament, by its ability to grant or to refuse new powers, to exercise some degree of administrative control over the development of local government.

Importance of Private Bill Legislation.—A word must be said about the importance of private Bill legislation in English local government. The system leads to great flexibility. Progressive local authorities may have needs and special conditions which are peculiar to themselves, or may be able advantageously to experiment with novel services (*m*). These wants cannot properly be met by powers granted by general Acts which, simply because of their generality of application, must put uniformity before the individual convenience or desires of particular authorities. Local Acts promoted by the authority concerned and applying solely to itself meet these needs.

Moreover the resort to this procedure gives Parliament opportunities to watch over the development of local government in a way which the mere passage of general Acts is incapable of affording. In this connection the provisions of the Local Government (County Boroughs and Adjustments)

(*m*) *E.g.* Birmingham's Municipal Bank.

Act, 1926 (n), are instructive, for that statute enacted that for the future county boroughs should only be created by private Bill, and thus secured to Parliament itself the direct control over the progress of the greater municipalities.

Historically, too, private Bill legislation is important in its connection with local government. In the early eighteenth century the beginnings of the modern system of local government began to show themselves in the setting up of improvement commissioners by local Acts. This fact has forever afterwards served to render local authorities familiar with direct resort to Parliament, in order to overcome their own particular difficulties, so much so that this right of access to Parliament is regarded as a privilege to be jealously preserved, and has, perhaps, helped to make unnecessary any system of close central administrative control by Government Departments, such as characterises local government on the Continent. In consequence it is by no means an exceptional matter for the greater local authorities at any rate to resort to private Bill legislation, and many have almost complete codes of peculiar law and powers obtained in this way. This is one of the more important reasons why it is practically impossible to give a complete picture of the *functions* of local government in England. One can only state what are the powers given by general Acts, either to all local authorities or to all local authorities of a particular class ; but this statement can take into account none of the modifications in these general powers nor any of the special powers applying to individual authorities by virtue of private legislation promoted by themselves. Any statement of general powers may give an entirely false or inadequate impression of the powers of any one particular authority, and must always be read subject to the local Acts applying in any given area.

Simplification of Private Bill Legislation.—The defects of the system of private Bill legislation described above

(n) Now Local Government Act, 1933, §§ 139 and 140. See now, however, the Local Government (Boundary Commission) Act, 1945, which creates a new procedure. Reference to the Act is made above, Ch. III.

are obvious. Before using the omnipotent force of Parliament in the interests of individuals or corporations, the utmost care must be taken to ensure that no injustice will be done, and the procedure is almost inevitably expensive. On the other hand, some of the matters which come before parliamentary Committees in this way are in reality non-controversial, and do not merit the taking of so much trouble. There is a fashion even in private Bill legislation, and once a Committee has sanctioned some particular type of clause its decision can be cited in later cases and the question of principle is no longer in dispute. Thereafter the matter of most importance is that interested parties should be given a proper opportunity for urging special circumstances which make the previous precedent inapplicable. Hence there has been a progressive tendency to supersede private Bill legislation by simpler and cheaper methods of conferring powers upon local authorities. One very obvious illustration is afforded by the casting into the form of general Acts of provisions which have passed through an experimental stage in the form of sections in local Acts. Much of the sanitary legislation has thus been generalised from the successful local legislation of particular authorities, and, if it be remembered that the powers of improvement commissioners, who were the immediate pioneers in urban local government, were derived from local Acts, it is clear to what extent this process has gone. In addition, however, steps have been taken to simplify in certain cases, and so to cheapen, the process of private Bill legislation itself; and the methods of conferring powers upon local authorities thus evolved must now be considered.

3. Clauses Acts.—Many clauses in private Bills become in the course of time common form. A parliamentary committee decides that the grant of certain powers in connection with some local government service can properly be asked for, and this decision is followed to such an extent that every local authority promoting a Bill in connection with that service, inserts as a matter of course similar clauses. In the forties of

the last century the practice grew up of passing general Acts consisting simply of groups of such clauses, so that in future private Bills could incorporate them by reference and so save the time and expense of their detailed examination in Committee. The first of these "Clauses Acts," as they are called, was the Companies Clauses Consolidation Act of 1845, followed by the Lands Clauses Consolidation Act of the same year providing a complete scheme of powers for the compulsory acquisition of land, which is so frequently needed to make a local Act workable. In 1847 a series of these Acts dealing with local government was passed—Cemeteries, Commissioners, Gasworks, Markets and Fairs, Harbours, Town Police, Town Improvement and Waterworks—though at the present day most of the sanitary clauses contained in them have been made of general application by incorporation in the Public Health Acts (*o*). These Clauses Acts have the additional merit of producing some degree of uniformity in the powers obtained by local authorities through the medium of private Bill legislation, for they provide complete sets of machinery for the matters they deal with. A private Bill incorporating one or more of the Clauses Acts, need therefore be little more than a skeleton, and the real question Parliament will have to decide is whether the promoting local authority shall be allowed to undertake the service it asks for, and whether the modifications of the Clauses Acts, which it regards as necessary to suit its own conditions, shall be sanctioned. The Clauses Acts provide machinery: they do not deal with matter of policy. The principle underlying them, in other words, is to leave private Bill legislation as the normal method by which local authorities seek to obtain new powers outside the ordinary course of general legislation, but to provide complete and uniform machinery for incorporation in local Acts (*p*).

(*o*) *E.g.* Public Health Act, 1875, §§ 160 and 171 (as amended by the Public Health Act, 1936, 3rd Schd.), incorporating parts of the Towns Improvement Clauses Act, 1847, and of the Town Police Clauses Act, 1847. The Waterworks Clauses Acts have now been replaced by the Water Act, 1945.

(*p*) Later legislation has often gone further and provided simpler methods than local Acts for bringing Clauses Acts into force: *e.g.* Gas and Water

A further simplification is provided by the use of the Adoptive Acts already mentioned. Especially in the case of the earlier Adoptive Acts which were designed to enable the inhabitants of an area to set up some service and create a local authority to administer it, the desire to provide a cheap alternative to the promotion of a private Bill was obvious.

4. Provisional Orders.—Provisional Orders form an attempt to simplify the appeal of local authorities to Parliament for the grant of new powers, and mark a further stage in the development of a more extended sphere for local government. Parliament still alone grants new powers, but leaves a large part of the decision and all the preliminary investigation in the hands of an executive Minister.

The power to make provisional orders is given to Ministers by numerous Acts (*q*). The order made by the Minister is, however, as its name implies, only conditional, and confers no powers until it is confirmed by an Act of Parliament. This is clearly shown by the procedure laid down by the Local Government Act, 1933, governing the provisional orders made by the Minister of Health under the powers contained both in the Act of 1933 itself and in any subsequent legislation. A local authority wishing for powers, which the Minister of Health is empowered to grant, applies to the Minister to make the necessary provisional order. The Minister may, if he thinks fit, simply refuse to act at all ; if, however, he is prepared to consider the matter further, public notice of the application must be given in the *London Gazette* and in the local press, and persons interested may object to the Minister. These objections must be considered by him, and generally he must order the holding of a local inquiry before an inspector of the Ministry, who hears the evidence and arguments presented by the parties concerned. The inspector makes a confidential

Works Facilities Acts, 1870 and 1873 (by provisional order) ; the Electric Lighting (Clauses) Act, 1899, is to be incorporated in provisional orders under the Electric Lighting Act, 1882, and also in special orders, which are substituted for provisional orders by the Electricity (Supply) Act 1919, § 26.

(*q*) *E.g.* Local Government Act, 1933, §§ 112, 140, 160 and 293. Other Acts give powers to make provisional orders ; *e.g.* Tramways Act, 1870.

report to the Minister, who then decides whether to accede to the local authority's application. If his decision is favourable, he makes the necessary provisional order. But this provisional order has no force until it is confirmed by Parliament. This last and effective stage is performed by Provisional Orders Confirmation Bills. Formerly each Bill contained in its schedule several provisional orders, though now it is the practice, at any rate in the case of an important provisional order, to confine the Confirming Bill to obtaining the approval of Parliament to that one order. Each of these Bills is introduced by the Minister, whose provisional orders it confirms, as a general Bill, but its passage through Parliament is governed by peculiar rules, partaking in some degree of the provisions applicable both to general and private legislation. After its first reading the Confirmation Bill is referred to the Examiners to see that Standing Orders relating to such Bills have been duly complied with. If any particular provisional order scheduled to the Bill is to be opposed, the opponents must deposit petitions against it, and the order is then referred to a Select Committee, and dealt with as if it were a separate private Bill. If there is no opposition, the Bill passes as a general Bill (r).

One advantage offered by this procedure by way of provisional order, is that the Confirmation Bill is introduced and passed through Parliament as a Government measure with some guarantee of Government support behind it. Unless opponents petition against a particular order, there is every probability of the orders scheduled to the Bill attaining the force of law in the shortest possible time, and the local authorities interested are not technically appealing to Parliament, but are solely applying to the Minister (s). Unless opposition is offered, they are not concerned with, nor financially affected by what happens in Parliament.

For the acquisition of new powers by provisional order three conditions must be satisfied. First, some Minister or Govern-

(r) Local Government Act, 1933, § 285.

(s) *Re Morley* (1875) L.R. 20 Eq. 17; 42 Digest 257, 2898.

ment Department must be given power by statute to make provisional orders in the matters concerned. Secondly, the local authority wishing for the new powers must itself take the step of applying to the Minister or Department, when either the statute under which the provisional order is to be made, or the rules of the Department ensure adequate publicity and an opportunity for interested parties to object. Lastly, the order has no force until scheduled to a Provisional Orders Confirmation Bill and until this Bill is passed into an Act of Parliament, a further opportunity being given then to opponents to state their reasons for objecting to the provisional order. At any rate where a provisional order is not strongly opposed through all its stages, the whole procedure is in effect a simplified form of private Bill legislation, designed to enable the quick and easy passage of certain types of local legislation which experience has shown to be desirable (*t*).

From the first of these conditions it is obvious that procedure by way of provisional order is not available as an alternative in every case where a local authority could promote a private Bill. Provisional orders can only be made when powers to make them have been expressly conferred by statute, and in practice such powers have only been given in respect of matters which fall near to the routine of administration. Thus the Local Government Act, 1933 (*u*), enables the Minister of Health to make provisional orders, empowering a local authority to acquire compulsorily land needed by it for the performance of its duties as a public health authority. But in some cases the power to make provisional orders is wider. One of the most useful of these powers is contained in §303 of the Public Health Act, 1875, which provides that the Minister of Health by provisional order may "wholly or partially repeal, alter, or amend any local

(*t*) A still further simplification of even the procedure by provisional order is introduced by § 26 of the Electricity (Supply) Act, 1919. Under that section a "special order" made by the Minister of Transport is effective for certain purposes after being approved merely by resolutions of each House of Parliament. This, however, is a matter more properly dealt with in Ch. XIV, Delegated Legislation.

(*u*) §§ 159 and 160; Public Health Act, 1936, § 306. See above p. 230.

Act . . . which relates to the same subject-matters as " that Act or the Public Health Act, 1936 (*v*). The effect of this section is startling : once a local authority has obtained even one local Act dealing with sanitary matters, it can, in theory at least, proceed to extend it almost indefinitely without the necessity for it to appeal directly to Parliament. In practice a use is made of this section which is little short of what might be thought theoretically possible. The only limitation is that the matters dealt with by the provisional order must be relevant to provisions of the local Act, which must itself relate to matters dealt with by the Public Health Act ; but the actual provisions which are repealed, altered or amended need not be confined to sanitary matters, and the Minister considers that this power enables him to extend such provisions.

5. The Public Works Facilities Act, 1930.—The expense and delay attendant upon the promotion of private Bills has for some time been a frequent subject of complaint, and an interesting simplification of the procedure is contained in the Public Works Facilities Act, 1930. That Act was introduced as part of a scheme to deal with the problem of unemployment, and its provisions were only temporary, expiring on the 31st of December, 1932, though by the Expiring Laws Continuance Act, 1932, they were extended for one further year ; so that the system of conferring powers which it introduced was purely experimental (*w*).

The procedure introduced by this Act showed private Bill legislation reduced to skeleton form. In the cases in which the Act applied the local authority made application to the appropriate Minister, who had to satisfy himself that the application fell within the terms of the Act. The local authority must

(*v*) Public Health Act, 1936, § 317. The power also extends to cover provisional orders relating to water supply : *ibid.*, § 116.

(*w*) The later Expiring Laws Continuance Acts have not kept alive the powers in the Act of 1930 mentioned in the text except to permit of the completion of schemes submitted to the appropriate Minister before the end of 1933.

also serve such notices, etc., as would be required of it by the Standing Orders of the Houses of Parliament, if it were proceeding by way of private Bill, and opponents to the proposed grant of powers might make objections to the Minister. If any such objections were made, the Minister must hold a local inquiry. When these conditions had all been satisfied the Minister might make a "scheme" providing for the grant of the necessary powers to the local authority concerned, and must at once introduce a Bill into Parliament to confirm this scheme. So far, the procedure did not, within the limits to which it was applicable, differ materially from that adopted in the making of a provisional order, being designed solely to ensure that the powers conferred by the Act were only utilised in a proper case and subject to efficient safeguards for the interests of affected parties. But, on the introduction of the Confirming Bill, a startling departure from ordinary procedure was adopted, for the Act of 1930 provided that, after its introduction, the Bill was to be deemed in each House to have passed through all its stages up to, and including, the committee stage, so that all that remained to be done was for the report and third reading stages to be taken in the Commons and the Lords before its presentation for the Royal Assent.

The Act of 1930 therefore, temporarily and purely experimentally, introduced a procedure whereby in effect Parliament delegated to a Minister of the Crown the sole conduct of all the steps in both Houses in the passage of a private Bill, prior to the report stage. The Act, though a temporary measure, may presage some more general simplification in the whole process of private Bill legislation.

CHAPTER XIV

DELEGATED LEGISLATION

Sovereignty of Parliament.—The methods, discussed in the last chapter, by which powers are conferred upon local authorities, have one common characteristic, in that they all involve an appeal to Parliament which itself directly grants the powers required. All, in other words, take the form of Acts of Parliament, so that the sovereignty of Parliament is their immediate source.

The sovereignty of Parliament involves three characteristics : Parliament can legally do anything, there is no competing legislative power residing anywhere else, and there is no body or person capable of pronouncing an Act of Parliament to be void (*a*). This third characteristic most clearly applies to all the forms of legislation mentioned already. Obviously English courts of law are unable to hold a general statute to be invalid : the law, which they administer and which determines the limits of their jurisdiction, is composed partly of Common Law and partly of Acts of Parliament, and the latter they must accept unquestioningly. But the same thing is true of Acts of Parliament other than general ones. "The legislature, in passing a private Act, is as omnipotent as in passing a general Act" (*b*). The courts cannot question the validity of a private Act, and cannot in consequence even listen

(*a*) See Dicey, *Introduction to the Study of Constitutional Law*, Chs. I and II.

(*b*) *Per* Byles J. in *Earl of Shrewsbury v. Scott* (1859) 6 C.B. (N.S.) 1, p. 219 ; 42 Digest 604, 50. Hence a private Act may repeal the provisions of a public Act ; *Re St. Dunstan's, Stepney* [1937] P. 199 ; Digest Supp.

to a plea based on the allegation that the Act was procured by fraud: it is an Act of Parliament and as such, until repealed, forms part of the law (*c*). In the same way a provisional order when confirmed by Parliament is itself equivalent in its effect and force to an independent statute (*d*). All the forms of legislation which we have already considered are therefore imperative and absolute. No court can hold them to be invalid, and the powers which they confer cannot legally be questioned in any manner.

Reasons for Delegated Legislation.—But the partial process of delegation, which such procedure as that by provisional order illustrates, does not serve sufficiently to relieve the pressure upon parliamentary time, and further delegation has become the practice. Broadly, such delegation takes the form of a general Act conferring upon a Minister or Department power to make rules, orders, or regulations (*e*), or to confer powers on, or constitute authorities within prescribed limits. For certain purposes and subject to certain conditions Parliament delegates to the Executive powers which otherwise Parliament alone could exercise.

(i) **Flexibility.**—The reasons which have led to the creation of this wide sphere for delegated legislation are, in the main, three in number. In the first place a general Act may be passed setting up a new local government service, but the Act by its very nature may prove to be too rigid to provide that degree of flexibility or even of progressive development, which the circumstances of individual local authorities may call for.

(*c*) *Lee v. Bude, etc., Railway Co.* (1871) L.R. 6 C.P. 576, p. 582; 42 Digest 611, 117.

(*d*) *Bessemer & Co., Ltd. v. Gould* (1912) 107 L.T. 298; 42 Digest 782, 2123.

(*e*) There is no satisfactory distinction drawn in the drafting of Acts of Parliament between "rules," "orders," "regulations," "schemes," etc. The words seem to be used indifferently to indicate subordinate legislation of almost any kind. See *Report of Committee on Ministers' Powers* (Cmd. 4060/1932, pp. 16 and 17).

By restricting the scope of the Act to matters of general principle and leaving departmental orders, or rules, or regulations to deal with matters of machinery, these desirable results may be attained. A favourite device in such modern statutes is to require the local authorities concerned each to make a "scheme" or "plan" suitable to its own requirements for the administration of the new service, and to provide that, after safeguards to meet objections from interested parties and local inquiries, the scheme or plan may be approved by the appropriate Minister, and shall thereupon govern and become obligatory upon the authority which made it (*f*).

(ii) **Uniformity.**—A second advantage which delegated legislation enjoys is that a degree of administrative control over the activities of local authorities can be obtained by Central Departments armed with information as to the position of all local authorities and perhaps pursuing a general policy. In this way co-ordination on a national scale can be brought into being between the activities of local authorities in many widely scattered areas. As an instance, the problem of slum clearance may be considered. Obviously it would be impossible, however desirable, to clear all the slums in the country at once: the process must be a gradual one. Departmental control, exercised through powers of delegated legislation—as by the requirement of Ministerial consent to the operation of a scheme or order—may well enable uniform progress to be made in this direction all over the country.

(iii) **Pressure of Parliamentary Business.**—Lastly, practical necessity compels Parliament to relieve itself of some of the work with which it is otherwise faced, and by the political control it exercises over Ministers Parliament is, in theory at least, able to check the possible abuse of the wide

(*f*) *E.g.* Town and Country Planning Act, 1932; Education Act, 1944; Local Government Act, 1929 (public assistance); Midwives Act, 1936, § 1 ("proposals"); Air-Raid Precautions Act, 1937, §§ 1-3.

powers it delegates. Nor is this in reality such an alarming step to take. In practical politics the most important stage in the enactment of a general Bill is the second reading, for then it is that the general principle embodied in the Bill is approved. An important Bill will next pass through a committee of the whole House, where its details will be gone through clause by clause. In a lengthy measure this may cause the expenditure of a great deal of valuable Government time, since the Opposition may well deliberately attempt to cause delay in the hope that, by so doing, the Government may be prevented from reaching some later measure upon its programme which the Opposition regards as especially objectionable. The shorter a Bill is, therefore, the more quickly it can in general be passed through the committee stage. The machinery by which the general principle of the Bill is to be applied is often unintelligible to laymen, and, as that general principle has been already approved, the temptation is great to shorten the Bill by leaving the machinery, necessary to enable its general principle to be achieved, to be constructed afterwards by departmental orders, or rules, or regulations (*g*).

Hence modern legislative practice shows a tendency to confine general Acts dealing with local government to statements of general principle and to give to Ministers wide powers of making orders, rules, or regulations designed to fill in the necessary administrative machinery, to confer powers, or even, in some cases, to make the machinery of the Act work in the light of difficulties unforeseen at the time of its passing. The grant of these almost revolutionary powers is facilitated by the fact that the line between legislation and administration is hard to draw in practice, and that, in the past at least, a great deal of the work undertaken by Parliament, both in passing general and private Acts, has in reality

(*g*) Cf., e.g., Local Government Act, 1929, § 108, giving to the Minister of Health powers to make regulations for dealing with exchequer grants and the other financial provisions of the Act; Town and Country Planning Act, 1932, § 37 and 4th Schd., giving the Minister power to make regulations governing procedure.

been administrative in all but name (*h*). As an illustration we may take such a question as, shall slum property belonging to X. be cleared by the local authority, and if so, shall the work be done this year or next? Before the passage of the Housing Acts, the answer to these questions could only have been given by Parliament in the form of a local Act promoted by the local authority, and conferring upon it powers adequate for the purpose. X., no doubt even at the present day, will still say that special legislation ought to be required, as the decision may seriously interfere with his rights of property. In fact, however, once Parliament by passing general Housing Acts has decided that all slums shall be cleared, the decision when it shall be the turn of X.'s particular slum to be dealt with is reduced to a mere matter of administration.

Characteristics of Delegated Legislation.—The law has for long been familiar with powers to make rules etc. delegated by Parliament, for it has, for instance, had to consider the effect of powers to make bye-laws (*i*) conferred on local authorities or trading corporations, such as railway companies, and to deal with this matter it has developed a series of principles. Consequently, if Parliament merely grants to a Minister power to make rules or regulations for a specified purpose, certain results legally follow. Such a power, in contrast to the sovereign legislative powers of Parliament, is classified as a subordinate law-making power, and is characterised by three marks of its subordination. First, as it must be derived from the sovereignty of Parliament, it is only exercisable within the actual limits prescribed expressly or impliedly by statute: any purported exercise of the power which is *ultra vires* is void. Secondly, the person to whom the power of delegated

(*h*) The generality of its application may for present purposes be taken as the test of legislation as opposed to administrative commands, see below, P. 432.

(*i*) As to bye-laws, see p. 220 above.

legislation is given is unable to alter or extend the limits within which he may act : Parliament alone retains this right, and can, of course, totally take away the power by a repealing statute. Thirdly, the ordinary courts of law are able to control the exercise of the power : they cannot question the validity of an Act of Parliament, but they can hold delegated legislation to be void on the ground that it is *ultra vires*, and this in either of two ways : a person affected by the provisions of delegated legislation may passively disobey them, and when prosecuted or sued for their breach, he may set up their invalidity ; or he may himself take positive steps (j) to attack them and obtain a declaration from the courts that they are *ultra vires* and void (k).

Practical Disadvantages.—The application of these rules of law may produce unfortunate results from the point of view of the politician or administrator. To relieve the pressure on parliamentary time it is desirable to exclude from the ambit of statutes the administrative machinery by which their principles are to be put into operation, and to leave that machinery to be filled in by departmental orders, rules or regulations. But this course appears to involve a considerable sacrifice. If the administrative machinery were inserted in the body of the Act itself, the courts would be entirely debarred from considering its validity ; if, on the other hand, it is to be created by departmental legislation, then the courts are not so limited, and may even be able to decide that in some particulars it is invalid as being *ultra vires*.

This result has serious disadvantages. In matters of emergency (l) it is almost essential that some Department of Government, which can act more quickly than Parliament,

(j) See below, Ch. XVII.

(k) See, as to subordinate legislation, Dicey, *op. cit.*, Ch. II.

(l) *E.g.* orders under the Diseases of Animals Acts, 1894 to 1935, stopping the movement of cattle because of the outbreak of foot and mouth disease. During war-time, in particular, innumerable regulations, orders, etc., were made by almost every Government Department with the object of furthering the prosecution of the war and with the authority of Parliament.

should have powers of legislating, and that its exercise of these powers should be at once peremptory and unquestionable. Again, in ordinary matters not involving such extreme urgency it is highly undesirable that departmental legislation should be open to attack at any time however remote from its introduction. Chaos may well be introduced into the administration of some service, if, after years of smooth operation, some twentieth-century Hampden should be able to convince a law court of the existence of a technical flaw in its constitution.

The inconvenience of this judicial control over departmental legislation appears indeed to assume the proportions of an absurdity when two other considerations are taken into account. Parliament when it confers powers of delegated legislation upon Ministers has already approved the general principle of the statute which contains them, and may be assumed therefore to have been equally willing to pass in the form of law the administrative machinery necessary for putting that principle into operation had the Government thought fit to insert it in the body of the Act. Instead it is content to leave the construction of that machinery to Ministers—over whom, it must be remembered, it retains political control—by conferring upon them the power of making rules etc. which they deem necessary for the purpose. If these powers should prove in actual use to be too narrow, so that the necessary delegated legislation would technically be *ultra vires*, it is equally fair to assume that Parliament would, if asked to do so, pass the necessary amending legislation required to extend the powers. Viewed in this light it is not to be wondered at that politicians and administrators occasionally regard the control exercised by the courts over delegated legislation as an impertinent hindrance of the business of Government.

Again, the administrative machinery necessary for the working of the services undertaken by the modern State, whether through the agency of Central Department or local authorities, is frequently highly technical and unintelligible to anyone but the expert. If included in a Bill, upon the

assurance of the Minister concerned that the machinery was necessary and did not travel beyond the approved principle of the measure, Parliament could only pass it without question, and it would then be totally exempt from the control of the courts. The decision of what provisions are necessary, whether they are to be included in an Act or to take the form of departmental legislation, has to be done by the same experts, and the effective control of Parliament over the details is often no more apparent in the one case than in the other.

This chain of reasoning has not gone unchallenged (*m*). The opponents of the delegation of uncontrolled legislative powers to the Executive Government deny its necessity, and point out with more weight the dangers inherent in its adoption. It offers possibilities of abuse, which unscrupulous officers may seize upon in order to act deliberately in excess of the powers which it was the intention of Parliament to confer upon them ; again, the extent of powers may be unwittingly misinterpreted, and in either case the interest of the public in the maintenance of democratic institutions is injured. Viewed in this light the control of the courts is a necessary safeguard against the usurpation of power.

But these latter arguments have not carried the weight to which perhaps they are entitled. The politician may heartily endorse the excellence of free institutions while failing to admit the necessity of judicial leading strings. He views law primarily from the point of view of a legislator ; he may even regard Parliament as little more than a senate controlled by himself and designed to give, almost automatically, the force of law to the measures he proposes. Such an outlook is inconsistent with respect for the courts as the bulwarks of liberty. The business of government must go forward untrammelled by the criticisms of judges and undeterred by the pedantries of lawyers.

Exclusion of Judicial Review.—These considerations have led to the feeling that, if provisions contained in an Act of

Parliament are unimpeachable in the courts of law, the exercise of powers of departmental legislation derived from statute should similarly be immune from judicial control, and in fact various devices have been adopted for bringing about this result. The development of this process is closely connected with the gradual disappearance of parliamentary control over delegated legislation, for at first Parliament felt it to be necessary to retain for itself a close scrutiny of the legislative output of the Departments to which it had entrusted powers of making orders, rules, or regulations ; but, on becoming more acclimatised to the principle of delegated legislation and more pressed for time in which to do its work, it has become bolder and has simultaneously relaxed its control.

We cannot here attempt to deal with every possible form of procedure prescribed by Acts of Parliament for the exercise of the powers of subordinate law-making they contain, nor with the effect, in excluding judicial review, of every form of clause they embody (*n*). We must confine our attention to the more important types of delegated legislation. But it must once more be emphasised that powers of departmental legislation must be derived from the express provisions of Acts of Parliament : with one or two minor exceptions, applying only in unusual circumstances, Parliament enjoys the monopoly of all law making in England, and powers of this kind can only be derived by express delegation from Parliament.

(i) **Tabling.**—One form of clause conferring upon Ministers or Departments the power to make orders, rules, or regulations attempts to retain for Parliament itself a close supervision over the resulting delegated legislation. This is done either by providing that the rules etc. when made shall only come into force upon receiving the approval of each House by resolution (*o*),

(*n*) See C. T. Carr, *Delegated Legislation* ; *Report of Committee on Ministers' Powers*, Sect. II., Cmd. 4060/1932 ; F. J. Port, *Administrative Law*, Ch. IV ; C. K. Allen, *Law in the Making*, Ch. VII ; W. M. Graham-Harrison, *Notes on the Delegation by Parliament of Legislative Powers* (1932) ; J. Willis, *The Parliamentary Powers of English Government Departments* ; C. K. Allen, *Law and Order* (1945).

(*o*) E.g. "special orders" under the Electricity (Supply) Act, 1919, § 26 ; Town and Country Planning Act, 1932, § 8 and 1st Schd., p. 2.

or by requiring the rules etc. to be laid on the tables of the two Houses, either before (*p*) or after (*q*) they come into force, for a prescribed period of time, during which a resolution of either House expressly disapproving them, in the one case prevents them from coming into operation and in the other case annuls them. Sometimes, in other words, Parliament must positively approve; sometimes its passive acceptance is sufficient, it being left to the zeal or curiosity of individual members to examine the tabled documents, and if thought improper to move their rejection (*r*).

Rules made subject to these formalities have frequently been before the courts, and judicial opinions have been expressed as to the efficacy of this procedure in excluding review by the courts. Of such rules Brett L.J. said in *Dale's Case* (*s*),

"I am of opinion that the rules and orders have statutory authority, for not only is the authority given to certain persons by statute to draw them up, but it is provided that they shall be laid before Parliament for a certain time, and if not objected to they are then to be binding. Whenever that provision is introduced into an Act of Parliament it seems to me that the rules and orders, if not objected to by Parliament, become part of the statute."

This opinion has not, however, prevailed, for it is clearly settled that the resolutions of either House of Parliament are

(*p*) *E.g.* Town and Country Planning Act, 1932, § 8 and 1st Schd., Part I, para. 3.

(*q*) *E.g.* Local Government Act, 1933, § 299.

(*r*) The various forms of procedure to be complied with in different cases renders necessary a close examination of all such orders and regulations by the Ministries concerned. Occasionally a mistake takes place and the consequences are interesting. For instance, all regulations made under the Fire Services (Emergency Provisions) Act, 1941, were required to be laid before both Houses of Parliament "as soon as may be" after they were made. A number of regulations were made under this Act dealing with the establishment, etc., of the National Fire Service, and it was not discovered until 1944 that these regulations had not been laid before Parliament. In consequence it was necessary to pass the National Fire Service Regulations (Indemnity) Act, 1944, indemnifying the Home Secretary from the consequences of this failure and providing that the regulations should be deemed to have been laid before Parliament at the proper time.

(*s*) (1881) 6 Q.B.D. 376, p. 455; 42 Digest 782, 2116.

totally incompetent to alter the law (*t*), and the fact that they are passed to satisfy the conditions prescribed by a statute does not appear to alter their true nature as mere resolutions (*u*). The procedure, requiring either positive resolutions of the two Houses or tabling for so many days, on principle seems to be merely designed as a safeguard of a political nature, and to have no effect legally in excluding the jurisdiction of the courts to hold delegated legislation which has successfully passed through either of these stages to be *ultra vires* (*v*).

(ii) Clauses giving Statutory Effect to Delegated Legislation.—A more successful attempt to remove judicial control from departmental legislation is by the introduction into the statute conferring the power to make rules etc. of a clause providing that “the rules when made shall have force as if contained in this Act” (*w*). Such a clause sometimes is combined with the requirement of tabling in some form (*x*); sometimes no such step is required (*y*). The courts have had to consider clauses of this type, and appear to have laid down that their effects vary according to the form of rule-making power to which they are annexed.

Lockwood's Case.—In the first place, if the power given by the Act is simply in the form that, for effecting certain specified purposes, the Minister may make rules etc.—especially if the expression “as he shall deem expedient” is added—then the courts are disabled from holding the rules which he makes under this power to be *ultra vires*; for the clause

(*t*) *Stockdale v. Hansard* (1839) 9 Ad. & E. 1; 36 Digest 289, 377; *Bowles v. Bank of England* [1913] 1 Ch. 57; 11 Digest 504, 62.

(*u*) Cf. *R. v. Electricity Commissioners* [1924] 1 K.B. 171, pp. 207–208, 212–213; 20 Digest 197, 1. The point was not dealt with in *Falconer v. Stearn* [1932] 1 Ch. 509; Digest Supp.

(*v*) This is supported by the occasional addition of clauses expressly excluding the jurisdiction of the courts when rules etc. have been tabled or approved by Parliament; e.g. Town and Country Planning Act, 1932, 1st Schd., Part II, para. 6.

(*w*) For a detailed analysis of the effect of such clauses see Graham-Harrison, *Notes on the Delegation by Parliament of Legislative Powers*.

(*x*) E.g. Electricity (Supply) Act, 1919, § 7 (2).

(*y*) E.g. Housing Act, 1925, § 40 (5), now superseded by other procedure in the Housing Act, 1936.

expressly gives the rules when made the effect of an Act of Parliament. Thus in *Institute of Patent Agents v. Lockwood* (z), where a power in this form was under consideration, it was held that, as the rules had been thought by the Department in question to be expedient for carrying out its duties, they were clearly made in pursuance of the rule-making powers conferred by the Act, and therefore were to be treated as having the same force as the Act itself. Lord Herschell, referring to the clause providing that the rules when made should have force as if contained in the Act (a), put the matter as follows :

“ My Lords, I have asked in vain for any explanation of the meaning of those words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the Courts. . . . I feel very great difficulty in giving to this provision . . . any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act.”

In other words, once it is clear that rules have been made under the Act, then those rules automatically, where this clause is incorporated in the statutory power to make them, acquire the immunity from judicial control of a statute.

On the other hand, the exact limits of the principle laid down in this decision are by no means clear. The courts have shown themselves reluctant to admit that judicial review can be completely excluded, and have striven to draw a distinction between the question whether rules or orders are *ultra vires* and the question whether they have been made under the powers conferred by the Act. The first question is, it seems, entirely removed from the judicial sphere only when the second question must be answered affirmatively (b).

(z) [1894] A.C. 347 ; 36 Digest 856, 3434. Cf. *In re Hann. Ex parte Foreman* (1887) 18 Q.B.D. 393 ; 4 Digest 526, 4810, where the Court of Appeal refused to decide what was the effect of such a clause operating on rules required to be laid before Parliament.

(a) [1894] A.C. 347, at pp. 359-60 : Lord Morris vigorously dissented on this point.

(b) See especially *R. v. Minister of Health. Ex parte Yaffé* [1930] 2 K.B. 98, C.A. ; reversed H.L., *sub nom. Minister of Health v. R. (on the Prosecution of Yaffé)* [1931] A.C. 494 ; Digest Supp.

Where, as in *Lockwood's Case* (c), there can be no doubt that the rules are made under the power in the Act, because that power does not prescribe the performance of any precedent conditions to its exercise and the rules obviously relate to the subject-matter of the power, the effect of the clause is entirely to exclude the jurisdiction of the courts.

Yaffé's Case.—On the other hand, this clause is not so effective where the Minister is required to follow a certain course of procedure before making rules. In such a case, if the prescribed conditions precedent are not followed, any rules which the Minister purports to make are not in fact made under the powers conferred upon him by the Act, and in consequence, as no rules have ever in law been made, the clause is inapplicable to give statutory effect to the document issued by the Minister. Thus under the Housing Act, 1925, local authorities were empowered to make schemes for slum clearance within their areas. The Act contained provisions regulating the various steps to be taken in the preparation of these schemes and enacted that the schemes, after confirmation by an order of the Minister of Health, should "have effect as if contained in this Act" (d). In *R. v. Minister of Health. Ex parte Yaffé* (e) it was held that, where the local authority had not taken the prescribed steps before presenting its scheme to the Minister, the order which the latter had purported to make was not an order made under the Act and consequently acquired no statutory force, but was merely a worthless piece of waste paper.

But it is by no means certain that these are the limits beyond which the courts will not go in their interpretation of the decision in *Lockwood's Case* (f). Where conditions precedent to the exercise of a power have not been satisfied, they will hold that the power has never been exercised, and it is at

(c) [1894] A.C. 347; 36 Digest 856, 3434.

(d) These provisions have been replaced by a different procedure contained in the Housing Act, 1936.

(e) [1930] 2 K.B. 98; but reversed on a different interpretation of the Minister's powers under the Act: [1931] A.C. 494; Digest Supp.

(f) [1894] A.C. 347; 36 Digest 856, 3434.

least highly probable that they will go further and hold that the purported exercise of a power, in order to effect a purpose entirely foreign to that power, is void. If a Minister, for instance, has conferred upon him a power to make rules relating to health insurance, and, purporting to act under that power, he makes rules relating to unemployment insurance, they may be treated as without any validity in spite of a clause in the Act in question providing that the rules when made shall have force as if contained in the Act (g).

To cure this defect in the administrative armoury a modification of the clause giving statutory effect to departmental rules etc. has sometimes been adopted. It runs :

“the order when made shall have effect as if contained in this Act, and shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act.”

In a case where this clause is incorporated in a power to make rules etc. the purported exercise of the power is conclusive, and it seems cannot be questioned in the courts as being *ultra vires* (h), even though the prescribed steps have not in fact been followed.

Time at which Delegated Legislation may obtain Statutory Effect.—A paradoxical result is, however, sometimes produced by the introduction of these clauses giving statutory effect to departmental orders, rules, or regulations “when made,” for though they may be successful to prevent the courts from holding such orders etc. void when once they have been made, they do not exclude judicial control over the process of their making while it is still proceeding. Before the departmental order is actually made it has no statutory effect, and so, by the taking of appropriate proceedings (i), the courts can be asked to prohibit a Minister from proceeding

(g) See *Glasgow Insurance Committee v. Scottish Insurance Commissioners* [1915] S.C. 504, p. 510; 44 Digest 1311, d; *Minister of Health v. R. (on the Prosecution of Yaffé)* [1931] A.C. 494, pp. 501-3, 533-5, 537; Digest Supp.

(h) *Ex parte Ringer* (1909) 25 T.L.R. 718; 42 Digest 782, 2122.

(i) See below, Ch. XVII.

with the work of making it, on the ground that it is *ultra vires*. Thus, to take another illustration from the Housing Act of 1925, in *R. v. Minister of Health. Ex parte Davis* (*j*) the courts prohibited the Minister from confirming a scheme for slum clearance prepared by the Derby Corporation, not on the ground that the preliminary conditions were unsatisfied, but because the scheme sought to give the Derby Corporation powers to deal with the site, which the Act did not authorise. Had the courts been approached only after the Minister's order had been made, they might have been unable to consider its validity, for it would then have obtained statutory force, but, because they were dealing with the matter at an earlier stage, they could hold the scheme to be *ultra vires* (*k*). Thus the absurd result is brought about that the Minister, by doing an act which the courts hold to be beyond his powers, can, in cases where these clauses apply, give himself *ex post facto* the powers which he lacked.

(iii) "**The Henry VIIIth Clause.**"—One form of clause is occasionally adopted in statutes introducing local government services, which is so wide in the powers that it gives that there can in effect be no exercise of them which is *ultra vires*. This type of clause has received the *soubriquet* of "the Henry VIIIth Clause" from the fact that that strong-willed monarch induced Parliament to give him the widest powers of legislating by Royal Proclamation (*l*). One example of this occurs in § 67 of the Rating and Valuation Act, 1925 (*m*), which provides that the Minister of Health may by order "remove any difficulty" arising in bringing the Act into operation, even to the extent of modifying the provisions of the Act itself so far as seems to him necessary or expedient. So unlimited are the powers conferred upon the Minister by this clause that it would be practically impossible for the courts ever to say that

(*j*) [1929] 1 K. B. 619; Digest Supp.

(*k*) See too *R. v. Electricity Commissioners* [1924] 1 K.B. 171; 20 Digest 197, 1.

(*l*) Statute of Proclamations, 1539, repealed 1547.

(*m*) For the other cases in which this clause has been used see the *Report of the Committee on Ministers' Powers*, Cmd. 4060/1932, Annex II.

any exercise of them was *ultra vires* (n). Politically the justification for the use of this type of clause is that Parliament has approved of the general principle embodied in the legislation which contains it, and wishes to see it set into operation immediately. The best brains may fail to foresee some special difficulty which may only arise when the machinery of the Act comes to be put into actual operation. If such a difficulty should arise, it may be assumed that Parliament would be prepared to give its assistance in removing it by passing amending legislation; but this course would involve delay, and Parliament accordingly *a priori* delegates the power to remove difficulties to Ministers, who have proposed the legislation in question and in whom it has confidence.

Proposed Reforms.—Before leaving the subject of delegated legislation it is proper to notice that the wide powers of Ministers to make orders, rules and regulations free from the control of the courts has excited so much adverse comment that a Departmental Committee was appointed by the Lord Chancellor in 1929 to consider this and kindred questions (o). In its report this Committee on Ministers' Powers recognised that the grant of these powers of delegated legislation is both inevitable and desirable in the modern State, but it made various recommendations designed to produce uniformity and to ensure that the control of the courts shall only be excluded where such a course is really necessary. In the first place, it suggested that each House of Parliament should set up a committee to examine proposed legislation with a view to ascertaining that the grant of such powers is asked for only in proper cases, and to scrutinise the exercise of the powers when given in order to prevent abuse occurring. Secondly, it recommended that both the methods of confirming delegated legislation—as by tabling draft rules—and the nomenclature employed to describe the instruments by which it is exercised should be

(n) See *R. v. Minister of Health. Ex parte Wortley Rural District Council* [1927] 2 K.B. 229; 38 Digest 579, 1146.

(o) See below, p. 429, as to the other matters dealt with by it. The Report is Cmd. 4060/1932.

standardised. Thirdly, wherever practicable, delegated legislation should be open to review in the courts during a fixed period after it is made ; if its validity is not contested within that period, then only should it become absolute in its operation. Lastly, the Henry VIIIth Clause should be resorted to very rarely, and then only in exceptional cases. These were of course only recommendations and may be regarded as counsels of perfection, since, even if they were adopted in theory, the temptation to employ the sovereignty of Parliament to create exceptions may prove too strong for politicians intent on proving their ability by the smooth working of the measures they introduce.

Statutory Appeal to the Courts.—The modern fashion in this matter seems to be setting in favour of attempting to exclude the control of the courts from the process of making such orders etc., as primarily affect individual rights, but to postpone their coming into operation for a limited period after they have been made, within which period an appeal to the courts may be made. Thus in the Housing Act, 1936, provisions are contained enabling the validity of clearance orders made under that Act to be tested in the courts, but only within a specified period (*p*). These provisions, after requiring public notice to be given of the making of an order, lay down that any person desiring to question its validity, “on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with,” may within six weeks apply to the High Court (*q*). The Court is expressly empowered to “quash the order either generally or in so far as it affects any property

(*p*) 2nd Schd., replacing Housing Act, 1930, § 11, which in this matter set the precedent copied in the Land Drainage Act, 1930, 2nd Schd., Part III ; the Public Works Facilities Act, 1930, 1st Schd., Part III ; the Town and Country Planning Act, 1932, 1st Schd., Parts I and II ; Local Government Act, 1933, § 162 ; Special Areas (Development and Improvement) Act, 1934, 3rd Schd.

(*q*) The Local Government Act, 1933, § 162, permits a person aggrieved to apply within two months in the cases to which it relates. Appeal only lies in general to the Court of Appeal ; any further appeal to the House of Lords may only be made with the leave of the Court of Appeal.

of the applicant," but only on being satisfied that the order is either "not within the powers of this Act," or "that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with." This right of appeal is strictly limited. It is open only to a person "aggrieved" by the order and he can challenge it only on either of the two grounds mentioned in the Act. Moreover, if he alleges that some "requirement" merely has not been complied with, he must show that his interests have been substantially prejudiced thereby (r). It may well be a difficult task for the Court to find a logical foundation for this new statutory distinction between the "powers" and the "requirements" of an Act. So far the Courts have avoided giving a definition of these terms. On the one hand it is clear that orders, purporting to affect properties which are excluded from their operation by the express or implied provisions of the Act, are not "within the powers of the Act" (s). So too the fact that fundamental steps in procedure are not followed prevents the order from being within "the powers" of the Act (t). On the other hand, the meaning of "requirements" is even more uncertain, but it seems to refer merely to some minor piece of procedure in the steps taken in the making or confirmation of the order (u).

(r) *Re Bowman* [1932] 2 K.B. 621; Digest Supp.; *Marriott v. Minister of Health* [1937] 1 K.B. 128; [1936] 2 All E.R. 865; Digest Supp.; *Re Falmouth Clearance Order*, 1936 [1937] 3 All E.R. 308; 157 L.T. 140; Digest Supp. In *Re Manchester City (Ringway Airport) Compulsory Purchase Order*, 1934 (1935) 153 L.T. 219; Digest Supp.; it seems to have been assumed that "substantial prejudice" must be shown where it was claimed that the order was not "within the powers" of the Act. But this seems to be wrong: see below, note (s).

(s) *Marriott v. Minister of Health* [1937] 1 K.B. 128; [1936] 2 All E.R. 865; Digest Supp.; cf. *Burgesses of Sheffield v. Minister of Health* (1935) 154 L.T. 183; Digest Supp.; *Re Hammersmith Clearance Order*, 1936 [1937] 3 All E.R. 539; 157 L.T. 142; Digest Supp.; *Re Newhill Compulsory Purchase Order*, 1937 [1938] 2 All E.R. 163; 158 L.T. 523; Digest Supp.; *Re Butler* [1938] 2 K.B. 210; [1938] 2 All E.R. 279; Digest Supp.

(t) *Errington v. Minister of Health* [1935] 1 K.B. 249; Digest Supp.; *Frost v. Minister of Health* [1935] 1 K.B. 286; Digest Supp. As to the duty to act "judicially" in order to keep "within" the powers of the Act, see below, p. 417.

(u) *Re Bowman* [1932] 2 K.B. 621; Digest Supp. (omission of note referring to right of appeal: at most a "requirement"); *Frost v. Minister*

It is however only within this period of six weeks after the order has been made and advertised that its validity can be challenged in the courts, for the Act expressly provides that an order shall not otherwise be questioned "in any legal proceedings whatsoever" either before or after its confirmation (*v*).

Rules Publication Act, 1893.—The great increase in modern days of powers of rule-making, whether or not free from judicial control, has led to the production of a vast mass of delegated legislation, in an average year exceeding in bulk the legislative output of Parliament itself. This produces the necessity for some method of ensuring adequate publicity, both in the making of rules etc. so that interested parties may have an opportunity of presenting their views, and in the promulgation of the final result. A partial attempt to deal with both these problems was made by the Rules Publication Act, 1893; but that measure cannot be regarded as satisfactory, for it does not apply uniformly to all forms of delegated legislation.

(i) "**Statutory Rules.**"—The Act may be regarded as falling into three parts; the first defining the subject-matter to which it applies, the second designed to secure adequate publicity in the making of rules, and the third dealing with the publication of the rules when made. The Act applies to "statutory rules," which it defines as rules, regulations or bye-laws made under powers conferred by statute, and either relating to the procedure etc. of any court, or made by Order in Council, the Judicial Committee of the Privy Council, the Treasury, the Lord Chancellor, a Secretary of State, the Admiralty, the Board of Trade, the Ministry of Health, or any other Government Department. Thus in the *of Health* [1935] 1 K.B. 286; Digest Supp. (alteration of map: possibly a "requirement"). In the Local Government Act, 1933, § 162, the matter is made a little more specific, for "requirements" is replaced by "a failure to comply with any provision governing the procedure for the making or confirmation thereof."

(*v*) Cf. *R. v. Minister of Health. Ex parte Hack* [1937] 3 All E.R. 176; 157 L.T. 118; Digest Supp.

subject-matter which it embraces the Act is very wide, covering the statutory rule-making powers of any Department of the Central Government.

(ii) Procedure in making Certain "Statutory Rules."—

But in its second part the Act requires that its provisions for securing publicity in the making of rules shall be observed in the case of some only of these "statutory rules." These provisions apply only to "statutory rules" required by the statute under which they are made to be laid before Parliament *after* coming into effect. In other words, not only do the provisions not apply to all statutory rules, but they do not even apply to all statutory rules which are required to be laid before Parliament, for they exclude from their operation the rules required to be tabled *before* coming into effect. Moreover, even of these rules, which must be tabled *after* coming into force, the Act expressly excludes those made by the Minister of Health, the Board of Trade, the Revenue Departments, or by or for the Post Office, or under the Contagious Diseases (Animals) Acts (*w*).

Within the very narrow ambit where the provisions of this second part of the Act apply, they do secure some opportunity for interested parties to be heard before the rules come into force. The Act requires that forty days' notice shall be given in the *London Gazette* of the intention to make rules. Any public body (*x*) is given the right during this period to obtain a copy of the draft rules, and may make representations to the Department concerned which must be considered. At the end of the forty days' period, and after the consideration of any representations, the rules may be made, either in the original form as contained in the draft or with amendments.

"Provisional Rules."—But, as if these provisions were not already sufficiently restricted in their scope by their exclusion of a vast amount of delegated legislation, the Act

(*w*) Now the Diseases of Animals Acts, 1894 to 1935.

(*x*) "Public body" is not defined by the Act. In practice any person or body appearing to be interested is permitted to obtain a copy.

proceeds to contain an exception to its requirements, which, though designed to deal with exceptional circumstances, is so wide in its terms as to afford a method for evading the whole of the second part of the Act. If a rule-making authority certifies that on account of urgency or other special reasons it is inexpedient to follow the course prescribed by the Act, it may make the rules to come into force at once as "provisional rules," and, if this is done, the provisional rules continue in force "until rules have been made in accordance with the foregoing provisions of this Act." If a rule-making authority, in other words, chooses to resort to the making of provisional rules, it can entirely evade the Act, by the simple process of never making final rules, and so leaving the provisional rules in permanent operation.

Lastly, as though these provisions have not reduced the efficacy of the second part of the Act to vanishing point, many later statutes have excluded the operation of the Rules Publication Act, 1893, from the process of making the rules which they authorise (y). The Committee on Ministers' Powers recognised these defects in the Act, and recommended the passing of a new and more comprehensive measure (z), but this reform has not yet been introduced, though as a temporary measure much has been done by the Statutory Orders (Special Procedure) Act, 1945.

(iii) Publication of Statutory Rules and Orders.—The third part of the Act is more satisfactory than the second, for it applies to all "statutory rules" as defined by the Act. It provides for their publication in annual volumes in numbered sequence, so rendering them easy of access and reference. These volumes of "Statutory Rules and Orders" form therefore an almost complete record of all delegated legislation (a), and so go a great way towards preventing the mass of departmental orders, rules and regulations from being unknown and inaccessible.

(y) *E.g.* Factories Act, 1937, § 129. (z) Cmd. 4060/1932, pp. 63 and 66.

(a) Not quite complete, for the Regulations made under the Act of 1893 provide that statutory rules of merely local or temporary interest shall not be printed.

CHAPTER XV

CENTRAL ADMINISTRATIVE CONTROL

Administrative Control in France.—French administrative law recognises, as a definite branch of its subject-matter, a system of *tutelle administrative* by means of which the Central Government retains wide powers of controlling not only the decisions but even the composition of local authorities : in England no such system exists. This difference is to be explained by the historical developments through which the local government of the two countries has passed. In France a system of rigid centralisation, under which all local activities were under the direction of officers appointed by, and directly responsible to the Central Government, has gradually been replaced by one of decentralisation, making use of locally elected authorities. But traces of the earlier system still remain. The Frenchman, having become accustomed to centralisation, is still fearful lest de-centralisation should lead not to autonomy but to anarchy, and the group of powers, denominated by the expression *tutelle administrative*, still remains as a check upon the action of local authorities.

Development of Administrative Control in England.—In England the historical development of local government has been quite otherwise. At the very time when the danger that a real system of centralisation might replace local government was greatest, the Revolution of 1688 occurred, and introduced the principle, to which even now lip-service is paid, that there should be no interference by the Central Government in the affairs of local authorities. During the eighteenth and early nineteenth centuries, therefore, central administrative control over English local government was totally lacking, and indeed

the Central Government Departments were too primitive to be capable of exercising any such powers (a). Complete decentralisation typified local government.

Since the Reform Act of 1832, the number of services undertaken by local authorities and the number and size of Central Departments have grown simultaneously, and though no actual system of central control comparable to *tutelle administrative* has resulted, a series of powers of controlling local authorities has come into existence. It is impossible to base these powers upon any fundamental principle or to reduce them to the dimensions of a definite system: the only element common to them is that they tend to increase with the passage of time. They have come into existence piecemeal as convenience or the requirements of efficiency dictated: they are not uniform, but vary in extent with the different services over which they are exercisable. All that can be here attempted is to sketch the history of their development, and to give illustrations of the powers which go to subject local government even in England to central administrative control.

The Poor Law.—The poor law was the first local government service to be reformed in the nineteenth century, and in the Poor Law Amendment Act, 1834, the influence of Bentham is clearly apparent. He had emphasised the necessity for a detailed system of supervision and control over local authorities, and the grave fears then held of the financial dangers resulting from the local administration of the poor law made the country content to accept the principle he had enunciated. Hence the Act of 1834 set up the Poor Law Commissioners as the central poor law department, and gave them wide powers of controlling the local authorities it created.

Municipal Corporations.—A reversion to older ideas immediately followed, for the Municipal Corporations Act, 1835, made no provision for central control over the reformed

(a) As late as 1815 the Home Secretary's staff consisted of only two under-secretaries and eighteen clerks. See Redlich and Hirst, *Local Government in England*, Vol. II, p. 238 n.

boroughs (b). This is easily explicable on the ground that the reformers failed to foresee the important position which the municipal corporations were to achieve, and were therefore content simply to put a stop to corruption and decadence. But the failure to provide any central control for municipalities had important results, for, when political struggles over this question developed, it led to the setting up of the "principle of the Act of 1835," which was identical with the "principle of 1688," in opposition to the "principle of the Act of 1834."

Public Health.—With the introduction of public health legislation in 1848, an attempt was made to copy in this new service the central control which had been imposed upon the poor law. But now there were at stake issues other than the integrity of the public finances, which had served to make the control of the Poor Law Commissioners palatable in 1834. Public health was an innovation, and was not regarded as of an importance at all comparable to the keeping down of the poor rates. Moreover popular opposition to the workhouse test introduced by the Poor Law Commissioners, and the fact that centralisation or de-centralisation was proving a fertile ground both for political battle and historical dispute, served to erect the whole question into one of principle. The powers both of the Poor Law Commissioners and of the General Board of Health were repeatedly attacked in Parliament and the Press, and the direct extension of central control to services other than the poor law became in future impossible. The effect of this agitation upon the constitution of the Central Departments we have already considered (c); its effect upon the growth of central administrative control was two-fold. On the one hand the control over the poor law remained, complete but unique; on the other hand central control over public health and other services had to be sought in less direct and subtler ways. Moreover control grew piecemeal by

(b) Except that the consent of the Treasury was required to dispositions of corporate property and the contracting of loans—but this is concerned with the corporations as property owners rather than as local authorities.

(c) See above, p. 38.

reference to the requirements of each individual service and not in accordance with any general principle. The result is that at the present day there is a systematic control over the poor law, now exercised by the Minister of Health. Over other services no system exists, but powers have been given haphazard upon no consistent principle, and usually in connection with the making of grants in aid, which in the sum however give a formidable measure of control to the Departments dealing with particular local government services. But as powers of control have grown by reference to the services administered by local authorities, there is a complete lack of uniformity not only in the methods of control, but also in the extent to which control is exercisable over the different services. The matter is further complicated by the practice of the Departments, some exercising their powers more fully than others. In the result it may be said that the poor law stands apart, but that education, the police service, and, in quite modern times, highways are subject to a considerable degree of central control. Hence it is convenient to deal first with the central administrative control over the poor law, before passing to consider the ways in which control is exercised over other services administered by local authorities.

1. Central Administrative Control over the Poor Law.—The administration of the poor law was, until recently (*d*), unique in that the central control exercised over it is expressly recognised by statute to exist as a definite system. The Poor Law Act, 1930, which is a consolidating Act now governing the whole service, provides at its very commencement (*e*) that

“The Minister of Health . . . is, subject to the provisions of this Act, charged with the direction and control of all matters relating to the administration of relief to the poor throughout England and Wales, according to the law in force for the time being: Provided that nothing in this Act shall be construed as enabling the Minister to interfere in any individual case for the purpose of ordering relief.”

(*d*) See below, p. 347.

(*e*) § 1 (*i*).

Apart from the proviso preventing the Minister from ordering relief to be given to an individual, this amounts to little more than a statement of the general principle adopted in the Act, and the details of "the direction and control" exercised by the Minister are to be found in the specific powers conferred upon him.

Poor Law Orders.—The Local Government Act, 1929, abolished the old boards of guardians and transferred their functions as poor law authorities to the councils of counties and county boroughs, but the Poor Law Act, 1930 (*f*), still provides that all powers in connection with its administration are to be exercised by the persons authorised to do so by law, "under the control and subject to the rules, orders and regulations of the Minister." The Act gives to the Minister many powers for the making of these rules, orders and regulations. For instance, he may provide for the government of workhouses, and prescribe the nature and amount of relief to be given in them and the labour to be exacted in return (*g*). Similarly he has powers of regulating in the greatest detail the conditions to be observed in granting outdoor relief (*h*). Moreover by § 136 of the Poor Law Act, 1930 (*i*), a very general power is conferred on him : he may make "such rules, orders and regulations as he may think fit" for dealing with a long string of prescribed matters, such as "the management of the poor," and "generally for carrying this Act into execution in all other respects."

Thus the administration of the poor law is not only recognised as being under the Minister's "direction and control," not only are poor law authorities bound to act under his control and subject to his rules, orders and regulations, but in almost every particular he is given the widest powers of making rules, orders and regulations, going into the minutest details, and is in effect only debarred from ordering relief in individual cases.

(*f*) § 1 (*2*).

(*g*) Poor Law Act, 1930, § 23.

(*h*) *Ibid.*, § 45.

(*i*) Amended by the Local Government Act, 1933, 11th Schd.

The orders etc. made by the Minister may be applicable to all poor law authorities, or even may be made to deal with the affairs of only one authority (*j*). In the latter case the Minister's orders are made by him on his own authority and without the requirement of any confirmation by any other body. If, however, any order affects more than one poor law authority it is a "general order," and requires to be laid before Parliament and may be disallowed by Order in Council: but, if not disallowed, it has statutory effect (*k*). Other rules etc. can only be removed to be tested in the courts within twelve months after their making (*l*).

The Minister does not shrink from exercising these powers of making orders, rules and regulations so as to carry out his general duty to direct and control the administration of the poor law; and he has done this to such an extent that the Poor Law Orders form a sub-code little less important than the Act under which they are made. By orders he goes into the minutest details of administration, with the result that the local authorities administering public assistance have little room for initiative or discretion. With slight exaggeration it may almost be said that they are confined to making the decision whether in individual cases the relief prescribed by the Minister shall be given or withheld, and that they are in a position little differing from that of ministerial agents.

Control over Areas.—Closely akin to his powers to make the substantive rules for the administration of poor relief is the Minister's power to control the areas within which that administration is to be carried on. The poor law authorities of the present day are county and county borough councils, but the Minister has certain powers enabling him where he sees fit to vary to some extent the areas within which the poor law would normally be administered. He may order the

(*j*) For instance, he may order a local authority to enlarge or alter its workhouses—the work to be paid for by the local authority: Poor Law Act, 1930, § 22.

(*k*) Poor Law Act, 1930, § 136.

(*l*) *Ibid.*, § 142; amended by Administration of Justice (Miscellaneous Provisions) Act, 1938, § 7.

combination of local authorities for poor law purposes, and he may, either with the consent of the authorities concerned or after the holding of a local inquiry, set up joint committees of poor law authorities (*m*).

Inspection and Inquiries.—To enable him to exercise these wide powers, which virtually make him the autocratic dictator of the poor law, the Minister is given the assistance which the right to make inspections and inquiries affords. He may appoint Poor Law Inspectors, who are given the wide powers necessary to make them at once his eyes and, to some extent, his voice (*n*). Inspectors are authorised to visit any place where there is a poor person in receipt of relief, and may even attend the meetings of poor law authorities or their committees or sub-committees and take part in the deliberations, though they are not entitled to vote. Thus they may travel round the districts allotted to them, inspecting the administration of the poor law in all its forms, and by their advice and warnings they may guide local authorities along the paths approved by the Minister. Again, the Minister "may cause such inquiries to be held as he may consider necessary or desirable for the purposes of this Act" (*o*). These inquiries are held by the Poor Law Inspectors, who for this purpose may within certain limits require any person to attend and give evidence on oath or produce documents, and may charge the costs of inquiries to the local authorities concerned. In the field of poor law finance the Minister is given similarly extensive control. The poor law accounts of local authorities are audited by the district auditor, a fact which indirectly increases the Ministerial influence (*p*), and loans by local authorities for poor law purposes can only be raised with the Minister's approval.

Control over Poor Law Officers.—The direct control over administration of the poor law exercised by the issue of

(*m*) Poor Law Act, 1930, § 3.

(*n*) Poor Law Act, 1930, § 9. In fact he appoints inspectors whose areas of inspection cover the whole country.

(*o*) *Ibid.*, § 160.

(*p*) *Ibid.*, §§ 119 and 120.

orders, and supplemented by the indirect control resulting from inspection etc., is further reinforced by the wide powers vested in the Minister which enable him directly to control the poor law officers of local authorities. These powers make it possible for the Minister to bring himself into immediate contact, not only with the civil servants appointed by himself, but also with the officers appointed and paid by local authorities. Thus the Minister may order a local poor law authority to appoint and pay such officers, with such qualifications as he thinks fit (*q*), and in the event of a failure to appoint for twenty-eight days after an express requisition from him, he may himself appoint the officers at salaries determined by him but payable by the local authority concerned (*r*). He may also determine the salaries to be paid by local authorities to their poor law officers; and he may "direct the mode of appointment and determine the continuance in office or dismissal of such officers"—that is, he can refuse to allow local authorities to dismiss their poor law officers without obtaining his consent (*s*). Nor is this all; he may remove or suspend any officer whom he considers unfit, incompetent, "or who"—and here comes the vital point—"at any time refuses or wilfully neglects to obey and carry into effect any rules, orders and regulations made by the Minister" (*t*). Not only may the Minister order local authorities to appoint poor law officers, not only may he direct the amount of the salaries to be paid to them and in effect control all the other incidents of their service, not only may he require his consent to their dismissal (*u*), but he may actually himself dismiss or suspend those officers of local authorities for disobedience to his orders. Naturally it is not to be wondered at that the Minister's control over the poor

(*q*) Poor Law Act, 1930, § 10. Amended by the Local Government Act, 1933, 11th Schd., so as to bring the provisions as to security to be given by officers into line with the general law.

(*r*) Poor Law Act, 1930, § 11.

(*s*) *Ibid.*, § 10.

(*t*) Poor Law Act, 1930, § 13; compare § 37, where similar powers are given to the Minister over officers of boarding-houses.

(*u*) In fact, under the existing Public Assistance Order, 1930, Art. 157, he only requires his consent to be obtained for the dismissal of a senior poor law officer.

law works smoothly, for, if there is a conflict between the orders of the Minister and the orders of a local authority, the latter's officers will almost automatically obey the Minister, since they know that disobedience to him may be followed by dismissal. On the other hand, in such a case disobedience to the local authority cannot injure them, for the Minister can, and will, by refusing his consent to their dismissal, maintain them in office.

These powers which the Poor Law Act of 1930 confers upon the Minister of Health are very formidable, and put the whole administration of the poor law largely under the closest form of central control. In the sum their result is that on the one hand the Minister could be almost the only poor law authority in the country, and on the other hand that the local authorities administering public assistance are on ultimate analysis in little better position than the local ministerial agents of a Central Department (v), although in fact the Minister does not unduly interfere with the exercise of some degree of discretion.

2. Central Administrative Control over other Services.—The control exercised by the Minister of Health over the administration of the poor law stands by itself as a definite system of subordination of local to central authority, and remains to the present day as a legacy from the Poor Law Amendment Act, 1834. Other local government services have never been subjected to central control of such a systematic and complete kind, but comparable powers have from time to time been given to Central Departments in particular instances. These powers have, however, grown up piecemeal, so that in no service other than the poor law is the central administrative control so thorough. However, a way of securing a large measure of control over other services, more efficient than by a mere borrowing of isolated powers from the poor law, has

(v) This does not, of course, imply that the local administration of public assistance is limited to a mere rule of thumb application of Ministerial Orders. A great deal of responsibility must rest on poor law authorities; the attention to the needs of the individual poor person has many aspects, and calls for detailed effort.

been found, so that in an indirect way something like a system of central control has been created over other services also. This is achieved through the powers conferred on Central Departments over the finance of local authorities. We shall, however, first attempt to compare the extent of central control exercised over other services with the subjection of the poor law to the Minister of Health.

Express Statutory Recognition.—In the first place, statutes dealing with local government services other than the poor law do not usually contain any such wide statement of the powers of Central Departments, as that with which the Poor Law Act, 1930, commences. But this does not mean that they do not recognise the existence of central authorities between which and local authorities the whole of the powers contained in them are divided. Hence in all cases it is almost as important to discover what is the central authority, as what are the local authorities for the service in question. As an example of the extent to which these Acts have gone in recognising anything like a system of central control, we may take the Education Act, 1921, whose first section simply stated,

“The Board of Education shall continue to be the Department of Government charged with the superintendence of matters relating to education in England and Wales.”

This colourless indication of the Department “charged with the superintendence” of education was in sharp contrast to the designation of the Minister of Health as “charged with the direction and control” of the poor law (*w*).

However, the modern trend is towards a greater measure of central control, especially where questions of grant from the Exchequer are involved. This may be seen in the first section of the Education Act, 1944, which Act repeals the whole of the Education Act, 1921, and most other statutes dealing with the education service and, in the words of the title, is an Act “to reform the law relating to education in England and Wales.”

(*w*) Poor Law Act, 1930, § 1 (1); see above, p. 341.

This first section provides for the replacement of the Board of Education by a Minister

“ Whose duty it shall be to promote the Education of the People of England and Wales and the progressive development of institutions devoted to that purpose, and to secure the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive educational service in every area.”

Delegated Legislation.—Secondly, the central authorities for local government services have had conferred upon them in many cases powers to issue regulations (x) or to make provisional orders, in order to fill out the framework provided by statute for the administration of the services. But these powers are in general far different from those possessed by the Minister of Health over the poor law. The latter may issue particular orders, which in effect may amount to detailed administrative instructions, while in the other cases the issue of regulations etc. is rather true sub-legislation (y).

Still, these powers, though giving nothing comparable to the Minister of Health's comprehensive direction of the administration of public assistance, do in fact give some degree of control over local authorities. For instance, the desire for elasticity has led to the practice of modern statutes requiring local authorities to prepare “ schemes ” for the administration or organisation of the services to be carried on by them. These schemes do not come into force until they have at least received the confirmation of some Central Department, but then they become binding on the authorities preparing them (a). The necessity for obtaining central

(x) *E.g.* the Home Secretary's power to make regulations as to “ the government, mutual aid, pay, allowances, pensions, clothing, expenses and conditions of service of the members of all police forces ”: Police Act, 1919, § 4.

(y) Though the powers of control of the Minister of Education under the Education Act, 1944, are very much wider than usual, *e.g.* § 68 (which enables the Minister to give directions to local education authorities), and § 88 (which enables the Minister to prohibit the appointment of a person as chief education officer).

(a) See, *e.g.*, Commons Act, 1899; Rating and Valuation Act, 1925, § 16 (assessment); Town and Country Planning Act, 1932; Air-Raid Precautions Act, 1937, § 3. The practice seems to have been borrowed from the schemes

confirmation does in fact give a wide control to the Central Department as to the sort of scheme it will confirm, and so enables it to exercise considerable influence over at least the machinery of administration. Sometimes in this way some degree of control is obtainable even over policy (*b*).

Alteration of Areas.—Similarly, central administrative control is exercised over the arrangement of the areas within which local government is carried on. We have already seen the methods provided by the law for constituting local authorities and altering their areas (*c*). It is sufficient here to recall that the confirmation of the Minister of Health is required for certain county council orders altering parishes.

Conferring Powers.—But the Minister may not only vary the extent of the areas administered by local authorities; he may also vary the extent of the powers they may exercise. He may by order confer on a rural district council any of the functions of an urban district council under any public general Act (*d*), and may confer any functions of a parish council on the council of a borough or urban district (*e*).

Inspection and Inquiries.—As in the case of the poor law, the Central Departments controlling other services are in some cases ensured that degree of supervision over local

regulating charities and directed by the Court or by the Charity Commissioners under the Charitable Trusts Acts.

(*b*) See, for example, Education Act, 1944, § 11 (development plan).

(*c*) See above, Ch. III.

(*d*) Public Health Act, 1875, § 276, amended by Public Health Act, 1936, 3rd Schd.; Local Government Act, 1933, § 272; Public Health Act, 1936, § 13.

(*e*) Local Government Act, 1933, § 271. This power has often been found extremely useful. Before the Act of 1933 transferred the powers of urban vestries to the councils of boroughs and urban districts (§ 269), a local transfer could be effected by an order of the Minister conferring the powers of a parish council upon the borough or urban district council, since under the Local Government Act, 1894, § 6, there were transferred to parish councils the functions of the vestry. In the same way the control over parish property in urban areas (Local Government Act, 1894, §§ 5 and 19; see now Local Government Act, 1929, § 115 and 7th Schd.; Local Government Act, 1933, § 305 and 11th Schd.), and a power to accept gifts of property (Local Government Act, 1894, § 8; see now Local Government Act, 1933, § 268) could be conferred on the councils of boroughs and urban districts.

authorities which is obtained by the right to institute inspections and inquiries. For instance, the inspectors of the Central Departments have, in holding local inquiries, the same powers as Poor Law Inspectors, and the Department may itself make orders providing for the payment of the costs so incurred (*f*). In like manner the Public Health Inspectors may attend and take part in the meetings of urban and rural district councils, though they are not entitled to vote (*g*). Other Acts also make provision for inspection by officers of Central Departments (*h*), but these powers are not so stringent as those exercised over the poor law, and are closely linked with the central control over finance. Many Acts also require local authorities to send reports and information to the Central Departments, either periodically (*i*), or when required to do so. Thus

“ every local authority shall make to the Secretary of State or to the Minister [of Health] such reports and returns, and give him such information with respect to their functions, as he may require ” (*j*).

These powers of requiring returns to be made are also closely linked with central control over finance.

Control over Finance.—In the case of the poor law the Minister of Health's direction and control are rendered effective, as has been shown, by the powers enabling him to obtain obedience from the poor law officers appointed by local authorities. No such method of enforcing central control exists in general, but in its place a far subtler, and in practice often wider power is obtained through the influence which

(*f*) Local Government Act, 1933, § 290.

(*g*) *Ibid.*, 3rd Schd., Part III, para. 5.

(*h*) *E.g.* Education Act, 1944, § 77; County and Borough Police Act, 1856, § 15.

(*i*) *E.g.* the returns of police rules sent to the Home Secretary quarterly by the watch committees in boroughs: Municipal Corporations Act, 1882, § 192; and the reports sent annually for all forces: County and Borough Police Act, 1856, § 14; Police Returns Act, 1892, § 1.

(*j*) Local Government Act, 1933, § 284, extending the provisions of the Local Government Act, 1929, § 51. Cf., too, Education Act, 1944, § 92, which requires local education authorities to make such reports and returns, and give such information as the Minister of Education may require.

Central Departments can wield over local finance. Over the administration of the poor law the Minister of Health is granted by statute a series of express powers giving him the most comprehensive supervision. Over other services this is not the case : usually a few isolated powers of control are expressly given, but by the exercise of control over finance Central Departments indirectly obtain an undefined, but wide sphere of influence. This financial control takes three forms, each enabling some degree of control to be obtained not only over administration but even over policy.

(i) **Over Grants in Aid.**—The most important form of financial control is that exercised over grants in aid. Many services have been grant aided, and early in the introduction of this system of providing assistance to local authorities out of Imperial taxation it was laid down that grants should be made conditional upon efficiency. Hence when new grants were created no absolute right to claim them was conferred upon local authorities : they could only be earned by obtaining the approval in some form of a Central Authority, which often was expressly empowered to lay down the conditions to be fulfilled. In this way no central control was directly imposed upon local authorities ; in theory they were, and still are entitled to carry out their duties in their own way and to disregard the grant : but in practice the grant proves too strong a temptation to the members of local authorities, who have every three years to face the ratepayers and ask for re-election. To accept the grant reduces the rates, but only at the expense of submitting to a considerable measure of central supervision.

Police Grants.—Thus at the present day (*k*) the receipt of the police grant (*l*) is payable by the Home Secretary on being satisfied that the force in question is efficient and that the Police Regulations made by him are complied with. To enable

(*k*) See above, p. 178, as to the grants in aid now payable.

(*l*) Introduced by the County and Borough Police Act, 1856, § 16. The grant, now amounting to one-half the net expenditure has been paid since the Local Government Act, 1929, under the authority of annual Supply Votes and without other statutory authority.

him to decide these questions, the Home Secretary appoints Inspectors of Constabulary, who inspect each force annually and make a report thereon to the Home Secretary. In effect to earn the grant a police authority must submit to inspection, and carry out the requirements of the Home Office as to the matters covered by the Police Regulations.

Education Grants.—Similarly with education grants the Minister of Education is empowered to pay to local education authorities sums up to more than one-half of the cost of the education provided by them, together with additional grants to the poorest areas, and grants at special rates in respect of expenditure on school meals and milk (*m*), and the Ministry may provide the regulations for the conditions to be satisfied for earning the grant, and may reduce or refuse it in cases where the regulations are not complied with. The Minister's regulations may make provision whereby the making of payments under the regulations is dependent upon the fulfilment of such conditions as may be determined by or in accordance with the regulations, and also for requiring local education authorities and other persons to whom payments have been made in pursuance thereof to comply with such requirements as may be so determined (*n*).

Housing Grants.—In the case of housing grants the same policy is pursued. Grants are payable "subject to such conditions as to records, certificates, audit or otherwise, as the Minister may, with the approval of the Treasury, impose" (*o*). Nor is this all; the Minister may withhold or suspend the whole or any part of a grant which he has undertaken to pay if he is satisfied that a local authority has "failed to discharge any of the duties imposed on them by virtue of the Housing Acts" or to observe any condition imposed on the making of a grant (*p*).

(*m*) Education Act, 1944, §§ 100 and 101.

(*n*) *Ibid.*, § 100 (3).

(*o*) Housing Act, 1936, § 112. Under this provision even borough councils are required to submit their housing accounts to audit by the district auditor. But in such cases the auditor has no power of disallowance or surcharge.

(*p*) Housing Act, 1936, § 113.

Control over Medical Officers of Health and Sanitary Inspectors.—In some cases through the indirect method of grants in aid there has been obtained a degree of central control over the officers appointed by local authorities comparable to that exercised by the Minister of Health over poor law officers. For instance, under the Public Health Act, 1875 (*q*), each sanitary authority was required to appoint a medical officer of health and a sanitary inspector. Grants equal to one-half of the salaries of those officers were made payable to sanitary authorities, but if these grants were claimed the Local Government Board was given wide powers to make regulations prescribing the qualifications, appointment, duties, salary and tenure of office of the persons appointed. Some authorities, however, preferred to retain independent control of these officers, and, as the amount of the grant was not great, they were able to refuse the grant and so to avoid subjecting themselves to the Board's regulations. In 1888, as a result of the reorganisation of the whole system of grants in aid which the Local Government Act of that year effected (*r*), these direct grants were abolished, and in their place there was imposed on county councils an obligation to pay to non-county borough and urban and rural district councils a sum equal to the abolished grants of one-half of the salaries of medical officers of health and sanitary inspectors. But there was no intention to lose the control over these officers which had previously been obtained by means of the direct grants. If the Local Government Board certified that the condition of compliance with its regulations had in any case not been satisfied, the county council was required to pay the sum involved to the Exchequer instead of to the non-conforming authority (*s*). The result was that an indirect grant was substituted for a direct one, but that, by forfeiting this benefit, a sanitary authority could still escape the control of the Board over its officers. The new class of county boroughs, which the Act of 1888 created, was given a share in the assigned

(*q*) §§ 189–191.(*r*) See above, p. 173.(*s*) Local Government Act, 1888, § 24.

revenues out of which the system of indirect grants was financed, the amount received in each case being based in part upon the amount previously received under the superseded system of direct grants. Hence those county boroughs, which before 1888 had purchased independence at the price of the old grant, received a smaller share of the assigned revenues ; but thereafter no grants direct or indirect were paid to county borough councils in respect of those officers.

In 1921 it was desired to use the indirect grants in aid of the salaries of medical officers of health and sanitary inspectors as a means of giving to the Minister of Health an even greater measure of control over those officers than he had previously enjoyed. But the different claims, on the one hand of non-county boroughs and urban and rural district councils, and on the other hand of county boroughs, made the task of drafting the Public Health (Officers) Act, 1921, a difficult one. The solution was found in drawing a line, so far as sanitary authorities other than county borough councils were concerned, between those which did, and those which did not claim the grant from the county council ; and, so far as county borough councils were concerned, by distinguishing between those which had, and those which had not claimed the old direct grant before their promotion to county borough rank under the Act of 1888. This explains the curious provisions of the present law.

The next stage in this complicated history was the abolition by the Local Government Act, 1929, of the system of indirect grants derived from the Act of 1888, and its replacement by the general exchequer grants (*t*). But again the control of the Minister over medical officers of health and sanitary inspectors was preserved by the provision that county councils should pay to sanitary authorities sums equal to one-half of the salaries of those officers (*u*). The draftsman of the Act of 1933 therefore had to consolidate these divergent principles

(*t*) See above, p. 181.

(*u*) Local Government Act, 1929, 3rd Schd., para. 3 ; now Local Government Act, 1933, § 109,

drawn from the Public Health Act of 1875, the Public Health (Officers) Act, 1921, and the Local Government Act, 1929.

The result is that there are three possible cases to consider, which may be conveniently tabulated as follows :

- (i) The Minister of Health may make regulations prescribing the qualifications and duties of all medical officers of health employed by borough or district councils. Obedience to these regulations is compulsory and altogether independent of the receipt of any grant.
- (ii) The Minister may also make regulations prescribing the mode of appointment and terms as to salary and tenure of office of medical officers of health and sanitary inspectors, as well as the qualifications and duties of sanitary inspectors. Compliance with these regulations can only be exacted from those councils of non-county boroughs and districts which claim from the county council the payment of the grant equal to one-half of the salaries of these officers. But if the grant is claimed, the councils receiving it do not only subject themselves to these regulations. Their medical officers and senior sanitary inspectors must be given security of tenure ; they must not be appointed for a limited period only, and they may only be dismissed by the council with the consent of the Minister, though the Minister may dismiss them without having to obtain the consent of the council. Nor is this all. The Minister may stop the county council from paying the grant in aid of salaries (v) by certifying that the medical officer has not complied with the Minister's regulations, through failure to send such reports and returns as they require, or to give reasonable information required of him by the county medical officer of health.

(v) Which thereupon becomes payable to the Exchequer instead.

- (iii) County boroughs are in a different position. If before they were promoted to county borough rank they received either the old pre-1888 direct grant or, after 1888, received the indirect grant from the county council, they must give to their medical officers of health and senior sanitary inspectors that security of tenure which is required of non-county borough and district councils claiming the present grant from county councils. Thus nothing that a county borough can do now will affect the position of its sanitary officers. It has no claim to any grant in aid of their salaries ; but the course it followed before it became a county borough will determine whether it may appoint those officers for a limited time only and whether it alone may dismiss them, or whether it must obtain the Minister's consent, or even submit to their dismissal by the Minister alone (*w*).

It is not remarkable that some authorities find it worth while to sacrifice this comparatively small grant in order to maintain their independence from Ministerial control (*x*).

General Exchequer Grants.—The new system of block grants introduced by the Local Government Act, 1929, has meant the discontinuance of many other grants earmarked for the assistance of particular services and payable on conditions giving a greater or less degree of indirect control to the Central Departments concerned. Thus certain road grants (*y*) and grants in aid of various services falling within the general designation of public health have been replaced by the new

(*w*) Local Government Act, 1933, §§ 108, 109, 110 and 113. The regulations made by the Minister must be laid before Parliament.

(*x*) It may be added that, though the indirect power of enforcing through withholding grants is absent, a county council cannot dismiss its clerk or medical officer of health without the Minister's consent, and that the Minister may make regulations prescribing the duties of the latter officer ; Local Government Act, 1933, §§ 100 and 103. So, too, a public analyst can only be appointed or removed with the Minister's approval : Food and Drugs (Adulteration) Act, 1928, § 15 ; Food and Drugs Act, 1938, § 66.

(*y*) See above, p. 180.

general exchequer grants. But this change of the procedure in making grants has not been permitted to interfere with the central control obtained through the power to withhold them ; indeed, though there may be a relaxation of the control exercised over detail, there has been an actual increase in the ambit of control, for, as the new block grant cannot be earmarked to any particular services, the expedient has been adopted of making its payment conditional on submission to central control over all services. This is effected by § 104 of the Local Government Act, 1929, which provides that the Minister of Health may reduce the general exchequer grant ordinarily payable to a local authority, "by such amount as he thinks just" if

- (1) he is satisfied that the local authority has "failed to achieve or maintain a reasonable standard of efficiency and progress" in its public health services, and that "the health and welfare of the inhabitants of the area of the council or some of them has been or is likely to be thereby endangered," or
- (2) he is satisfied that the expenditure of the local authority is "excessive and unreasonable," or
- (3) the Minister of Transport certifies that the local authority has failed to maintain its roads in a satisfactory condition.

The only check upon the Minister in the exercise of this power is that, if he decides to reduce a grant, he must lay a report of his action before Parliament (2). Now this section goes considerably further than was rendered necessary merely by the change from a number of earmarked percentage grants to one block grant. Previously not all, but only certain specialised

(2) The Midwives Act, 1936, § 4, provides that the power to withhold contained in the Local Government Act, 1929, § 104, shall apply to the new grant it introduced, and that, for the purpose of § 104, "the functions of an authority under this Act shall be deemed to be functions relating to public health services." Thus failure to carry out its duties under the Midwives Act, 1936, may endanger not only the midwives' grant, but also the general exchequer grant. The midwives' grant, is moreover, payable "subject to such conditions as to records, certificates, audit or otherwise, as the Minister may, with the approval of the Treasury, impose."

forms of the public health services had been grant aided or subject to the central control implied by such State assistance. Now, however, the whole of public health has come under the indirect control operating through the Minister's power to reduce grants, and default by a local authority in carrying out one minor part of its public health duties may have very serious consequences affecting the whole of its administration. Secondly, two entirely new provisions are enacted, giving to the Minister a power to supervise even the policy of local authorities, for he may under threat of reduction of grants compel local authorities, not only to maintain existing services in a state he considers efficient, but actually to make "progress."

Again, the Minister may for the first time penalise local authorities merely because he considers their expenditure to be "excessive and unreasonable"—a new check additional to the audit, which greatly increases his power to interfere in the sphere of policy.

Effect of Power to reduce Grants.—The power to withhold or to reduce grants is, though indirect, at once the most subtle and efficient form of central control, for few local authorities can withstand the temptation to earn grants, especially in connection with such expensive services as education and police, at the expense of submitting themselves to supervision and even direction. Moreover, the very looseness of the statutory provisions defining the power gives it an almost limitless field in which to operate; it was in this way, for instance, that the Central Government was able to prescribe uniform conditions of service and wages for school teachers employed by local authorities throughout the country (a). The Departments seldom have to go beyond hinting that, unless their wishes are deferred to, some alteration may be necessary in the amount of grants. It is a power which is effective without use: the mere fact that it is held in reserve is usually enough to secure obedience.

(a) Now, however, the Minister of Education has power to control the remuneration of teachers directly: Education Act, 1944, § 89.

The system of central control which it has developed secures, like all forms of central control, co-ordination and the subjection of local activities to national policy and interests ; but it is open to the criticism that it tends to make local authorities lean too much on the Ministry both for advice and even for initiative. In fact these powers, coupled with the large extent to which services administered by local authorities are supported by grants from the State, provoke the protest that the system is hardly fit to be called by the name of local government.

(ii) **The Audit.**—The second form of central financial control is exercised through the agency of the district auditor, whose jurisdiction covers all the accounts of local authorities other than certain of those of borough councils (*b*). The audit itself, and especially the provisions enabling the Minister of Health to sanction proposed expenditure and so render it immune from disallowance and surcharge (*c*), and his power, on an appeal from the district auditor, to remit surcharges properly made, form another most effective, though indirect, engine of central administrative control.

(iii) **Loans.**—Thirdly, a large measure of central control is obtained whenever local authorities wish to contract loans. We have already seen that statutory borrowing powers almost invariably require the consent of the Minister of Health to their exercise, and that this is so even when the purpose for which it is desired to borrow is one which is not directly under the Minister's control, as for instance in the case of loans for educational purposes (*d*). Even when borrowing powers are conferred by local Acts it is usual to find either that the Minister's consent is required or that returns of expenditure must be made to him, so that in this case also he at least acquires something in the nature of a right to audit the accounts relating to the loans.

(*b*) See above, Ch. VII, as to the audit.

(*c*) Local Government Act, 1933, § 228 ; see above, p. 202.

(*d*) See above, p. 194.

It is obviously desirable in the interests of the financial stability of local authorities that the control over their borrowing should reside in only one Department, able to exercise a comprehensive judgment over the whole question, and this is the explanation of those statutory provisions which require the consent of the Minister of Health to loans contracted in connection with services, such as education, over which he has no other control. In such cases, of course, the Minister consults the appropriate Department which alone is concerned with the questions of policy arising out of the proposed loan. Except in these latter cases, however, the Minister does not confine his examination of the circumstances, in which his consent is asked, to the financial position of the local authority in question. It is his practice to take into account whether the proposed works for which the loan is required are suitable and economical, and also whether there are other works which it is desirable that the local authority should undertake first. In effect, therefore, he is able to dictate to some extent the order in which a local authority shall proceed to provide itself with permanent improvements.

The power of Central Departments over local government finance in its different forms provides the most important method of obtaining a comprehensive control over services other than the poor law, and is the real sanction behind the other scattered powers expressly conferred by statutes. By a judicious exercise of these powers over finance, the Minister concerned can not only compel a proper performance of duties, but effectively require local authorities to submit to inspection, to make returns, to provide information and even to conform to Ministerial policy.

Default Powers.—In some cases, however, more direct forms of control exist, designed to prevent the breakdown of important services through the failure of local authorities to perform their duties. No definite system has been followed in the creation of these "default powers" which enable the Central Departments to ensure that the work of local authorities

is not allowed to lapse. But fashion in these matters has changed. The earlier forms of default powers often authorised the Department to make an order, enforceable in the Courts, requiring the local authority to perform its duty, or to appoint a person to perform the work at the expense of the defaulting authority (e). Modern practice seems to be hardening in favour of authorising the Department to transfer the functions, in respect of which county district councils make default, to the county council, while in the case of defaulting county and county borough councils, the Department may itself undertake the work. Illustrations may be given of the default powers existing in the case of certain services.

(i) **Public Health.**—The Public Health Act, 1875 (f), contained provisions permitting the Minister of Health, after holding a local inquiry, to make an order, enforceable in the Courts, ordering a defaulting local authority to carry out its duties. As an alternative he might appoint a person to perform the unfilled duties at the expense of the local authority. By § 57 of the Local Government Act, 1929, this procedure was rendered inapplicable to the councils of non-county boroughs, urban and rural districts, and instead the Minister was empowered after holding a local inquiry, to transfer the functions to the county council. Both these sets of powers have been repealed by the Public Health Act, 1936, in so far as they related to functions now included in the latter Act (g). In their place, it provides that, whether as the result of a complaint or on his own motion, the Minister may hold a local inquiry into the question whether any authority has failed to discharge its functions under the Act. If the Minister then considers that there has been such a failure, he may make an order declaring the local authority to be in default and directing it to perform its duty “in such manner and within such time or times, as may be specified in the order.” If the local authority fails to comply with the order, the Minister may

(e) *E.g.* Public Health Act, 1875, §§ 299–302, amended by Local Government Act, 1929, § 57.

(f) §§ 299–302.

(g) 3rd Schd.

enforce it in the courts. As an alternative he may, in the case of a defaulting county district council, make a further order transferring the functions to the county council, while, in the case of a defaulting county or county borough council, he may by order transfer the functions to himself. In either case the cost of performing the transferred functions remains with the defaulting local authority (*h*).

(ii) **Housing.**—A set of powers, with one exception almost identical, with those exercisable over public health, applies to housing. The exception is that, in the first place at any rate, the inquiry into the default of a rural district council is made by the county council which is empowered by order to transfer the function to itself. But even here the Minister may effect the transfer if the county council does not do so. In other cases the Minister, if of opinion that a local authority has “failed to exercise their powers . . . in any case where these powers ought to have been exercised” may, after a local inquiry, make a default order. Failure to comply again enables the Minister to transfer the functions in the case of a defaulting non-county borough or urban district council to the county council, and in other cases to himself (*i*).

(iii) **Education.**—The Education Act, 1944, arms the Minister of Education with default powers of a wide character. These powers apply in any case where local education authorities, or the managers or governors of any county school or voluntary school, fail to discharge

“any duty imposed upon them by or for the purposes of this Act” (*j*).

In any such event the Minister may make an order declaring the authority, or the managers or governors, as the case may be, to be in default in respect of that duty, and giving such directions for the purpose of enforcing the execution thereof

(*h*) Public Health Act, 1936, §§ 322–325.

(*i*) Housing Act, 1936, §§ 169–174.

(*j*) Education Act, 1944, § 99.

as appear to the Minister to be expedient. Any such directions are enforceable, on an application made on behalf of the Minister, by *mandamus*.

(iv) **Planning.**—Similar powers are contained in other Acts. Thus the Town and Country Planning Act, 1932 (*k*), provides (*inter alia*) that, if the Minister of Health (now Town and Country Planning) is satisfied, after holding a local inquiry, that a planning scheme should be prepared, he may order the local authority concerned to prepare and carry out such a scheme. If the local authority fails to do so to the satisfaction of the Minister within the time prescribed in his order, the “Minister may himself act,” or, in the case of default by a rural district or small urban district council, he may empower the county council to act “in the place of and at the expense of the local authority.” Again, if the local authority fails to enforce or carry out a scheme, the Minister may, after holding a local inquiry, require it to do so by an order enforceable in the courts, or “may himself act in the place and at the expense” of the defaulting authority, or, again, may empower the county council to act if the defaulting authority is a rural or small urban district council.

Effect of Default Powers.—The default powers exercised by Central Departments, covering as they do the whole of the public health and many other services, provide means of making compulsory the performance of the duties connected with these services. Nor is this all; the tendency of modern legislation to confer default powers is increasing and they often relate to specific acts rather than to the control of a whole service. Thus, if a local education authority fails to establish a properly constituted body of managers or governors for a county school, the Minister may make such appointments and give such directions as he thinks desirable, and may even give directions rendering valid any acts or proceedings which he thinks are invalid or defective owing to the default (*l*). So

too, if a local authority when required by the Minister of Health to make building bye-laws does not within three months make bye-laws satisfactory to the Minister, the Minister may himself make them (*m*). Many other such illustrations could be given. In these matters the element of default is often slight: yet the Central Department is empowered itself to act if the local authority, while prepared to perform its duty, is yet not willing to perform it in a manner agreeable to the views of the Department (*n*). By these methods a local authority may be forced to comply with the policy laid down by a Central Department.

The methods of enforcement, whether through the agency of the courts, or through the action of the county council, or the Central Department concerned, render these default powers the most drastic form of central control yet known outside the poor law. They, perhaps, reached their high water mark in the provisions of the now repealed Boards of Guardians (Default) Act, 1926 (*o*), which went so far as to enable the Minister of Health to interfere in the actual constitution of a local authority, and supersede elected guardians by persons appointed by himself (*p*). So far no definitely systematic introduction of default powers seems to have been attempted, but the inclusion of such powers in every modern Act dealing with local government services seems to have become common form. Undoubtedly there is much to be said in the national interest for thus securing the proper performance of services in every area, but, at any rate if these default powers are utilised, they open the door to the

(*m*) Public Health Act, 1936, § 69.

(*n*) *E.g.* Road Traffic Act, 1934, §§ 1 and 18 (as to roads subject to speed limits and provision of pedestrian crossings); Restriction of Ribbon Development Act, 1935, § 1 (adoption or alteration of standard width).

(*o*) Repealed by the Poor Law Act, 1927.

(*p*) The Act provided that, if it appeared to the Minister that a board of guardians had ceased, or were acting so as to render themselves unable, to discharge all or any of their functions, he might, by order, appoint any person or persons in their place with such powers as were necessary. The order had to be tabled, and was effective for one year, but might be extended for further periods of six months each.

criticism that the system they control is not truly one of local government.

Control by County Councils.—Before leaving the subject of central administrative control, it is desirable to notice to what extent the law has gone in making each county council a local “Ministry of Health,” in the powers it wields over the other local authorities situated within the boundaries of its administrative county. The Local Government Act, 1888, envisaged the time when some decentralisation of the powers possessed by Whitehall might take place, and fitted the county councils, which it set up, for undertaking these duties of supervision and control over lesser authorities. It provided (*q*) that the Minister of Health might by provisional order, made with the consent of the Central Department concerned, transfer to county councils any powers, duties, or liabilities of the Privy Council, the Secretaries of State, the Board of Trade, the Minister of Health, or of any other Government Department conferred by or under statute, so far as related to the administrative counties. The Local Government (Transfer of Powers) Act, 1903, extended this provision so as to permit of such transfer being made to an individual county council (*r*) on its application. In fact the large measure of devolution upon county councils provided for by these Acts was not achieved, and the powers conferred by them have never been employed. Hence the Local Government Act, 1933, repealed these provisions without re-enactment (*s*). Such supervisory functions therefore as county councils possess have been expressly conferred upon them by statute. This latter process has in fact given to county councils some degree of control over lesser authorities, but it has not yet reached the proportions worthy of the name of “county control.”

We have already seen that some considerable powers of altering boundaries and creating minor local authorities within

(*q*) Local Government Act, 1888, § 10.

(*r*) Or to a county borough council.

(*s*) 11th Schd. The Act of 1933, § 270, only re-enacts that part of the Acts of 1888 and 1903 which related to a transfer of the powers of a public body within the county or county borough.

their areas were formerly available to county councils (*t*), although except as regards parishes these powers have been replaced by the Local Government (Boundary Commission) Act, 1945. Moreover the exercise of some default powers takes the form of a transfer to county councils of the functions of lesser authorities (*u*). There are, however, a few cases when the county council is itself given powers of control, which can only be called default powers. Thus under the Local Government Act, 1894 (*v*), a parish council may complain to the county council that the rural district council is not carrying out within the parish its duties relating to the enforcement of the Public Health Acts (other than the Public Health Act, 1936), or the maintenance of its roads. Thereupon the county council may hold a local inquiry, and, if satisfied that the complaint is justified, may resolve that the duties and powers of the rural district council in the parish shall be transferred to itself. Similarly, under § 169 of the Housing Act, 1936, if the county council receives a complaint that a rural district council is not exercising its housing powers, it may, after holding a local inquiry and if satisfied that the complaint is justified, transfer the powers to itself, and thereupon becomes entitled to charge the district rates with expenses and loans.

In a few further cases powers comparable to those possessed by the Minister of Health have been conferred upon county councils. A county council may, on the application of a parish meeting of a rural parish having no parish council, confer by order on the parish meeting any of the functions of a parish council (*w*). To enable parishes to raise loans for the few purposes for which they are empowered to do so the county council's consent, in addition to that of the Minister of Health, is required (*x*), and they may obtain power to acquire

(*t*) Above, Ch. III.

(*u*) See above, pp. 360-363.

(*v*) §§ 16 and 63 amended by Local Government Act, 1929, 12th Schd.; and the Public Health Act, 1936, 3rd Schd.

(*w*) Local Government Act, 1933, § 273. A copy of the order must be sent to the Minister of Health.

(*x*) Local Government Act, 1933, § 195.

land compulsorily by order of the county council confirmed by the Minister of Health (y).

The county council is also given powers to enable it to cure defects in the constitution of district and parish councils, caused either by the failure to hold valid elections or by disability attaching to the members of the latter bodies. The county council may make orders for meeting difficulties in the election of parish councils, or for properly constituting parish councils (z). If elections are not duly held for district or parish councils the county council may by order make lawful the holding of an election, while if a district or parish council becomes incapable of acting, the county council may appoint persons to act temporarily in its place (a). Again, the county council may, subject to any conditions it thinks fit to impose, remove disabilities attaching to members of parish councils through interest in a contract or other matter, either where the number of members disabled from acting is so great as to impede the transaction of business, or where the county council is satisfied that it is in the interests of the inhabitants of the parish that the disability should be removed (b).

These powers of supervision conferred upon county councils are fragmentary, and cannot yet be regarded as part of a system whereby a "county control," at all comparable to central control, is created. Indeed, the present tendency, typified by the provisions of the Local Government Act, 1929, to extend the areas of local administration, may well do much to combat the growth of further supervisory powers of county councils, for, if pushed to its logical conclusion, it might lead to the result that county and county borough councils would remain the only effective local authorities in existence.

Central Administrative Control and the Law Courts.—

The consideration of the extent to which central administrative control has developed is necessary to any appreciation of the

(y) Local Government Act, 1933, § 168; though in this case the parish council may appeal to the Minister from the county council's refusal to make an order.

(z) *Ibid.*, § 55.

(a) *Ibid.*, §§ 55 and 72.

(b) *Ibid.*, § 76.

meaning of local government as understood in England to-day. Together with the control of the law, exercised by Parliament and the law courts, it forms the check upon local autonomy necessary to preserve national interests. The control of Parliament is, to some considerable extent as we have already seen (*c*), administrative in essence and is exercised through legislation and the political dependence of the Ministry upon the House of Commons. Control by the law courts is judicial in its form, and is necessarily subject to the defects from which judicial procedure must suffer (*d*). Moreover it is strictly confined to the enforcement of the law as it stands. It operates through the decision of particular cases brought before the courts by certain kinds of appropriate procedure. In recent times, however, there has developed a tendency or, as some would say, a definite system, whereby disputes relating to many matters of local government are withdrawn from the ordinary courts and submitted to the decision of Ministers or Departments of Government. This process, of course, gives a further scope for central control, but, as its most important side is that concerned with its relation to the general administration of the law, so it will be more appropriate to consider it in relation to the process of judicial control over local authorities (*e*).

(*c*) See above, p. 308.

(*d*) See above, p. 22.

(*e*) See below, p. 407.

CHAPTER XVI

LOCAL GOVERNMENT AND THE LAW COURTS

Results of Local Government having been in the Hands of Justices of the Peace.—It must be remembered that before the nineteenth century, at any rate since 1688, there had been no form of central control exercised over local authorities by executive Departments of State. What control of an administrative nature existed was exercised under legislative forms by Parliament, when it came to decide whether to confer new powers either by general or private Acts. During this period, as we have seen (*a*), local government was substantially in the hands of the justices of the peace, and this fact has had important influences, which still operate to produce a form of judicial control over local authorities.

Statutes had repeatedly heaped upon the justices duties and powers of an administrative nature without attempting to differentiate them from the strictly judicial functions exercised by the same persons, and had tended to erect quarter sessions into a court of appeal from the decisions of both kinds taken by individual justices or petty or special sessions. The result of this process was to cause a fusion or blending of the spheres of administrative and judicial functions, and in theory, at least in the early eighteenth century, quarter sessions could no more decide to repair a county bridge than to try a felon except upon the presentment of the grand jury. In course of time, partly by alterations in the law and largely as a result of practical necessity, the "county business" of quarter sessions came to be divorced from its judicial work, and to be performed in administrative and not judicial forms. But this

(*a*) See above, pp. 20-22.

practical recognition of the distinctions existing between administration and litigation came too late to alter the legal nature of both forms of work undertaken by quarter sessions, and the law regarded both alike as "judicial" in their intrinsic nature.

The result of this legal attitude towards the local government powers and duties of the justices is still important. A judicial control over their decisions was established, for these "decisions" were in theory "judicial," and were therefore subject to review in the Court of King's Bench by the use of the appropriate procedure provided by the prerogative writs (*b*). In this way, though no central administrative control existed, a central judicial control was able to prevent justices from exceeding the powers conferred upon them by the law, and local government was stamped with the nature of a quasi-judicial process.

But it must be remembered that the word "judicial" has two meanings.

"It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind—that is, a mind to determine what is fair and just in respect of the matters under consideration" (*c*).

The administrative work of the justices in its developed form was "judicial" only in the second of these senses, and when so engaged in it they did not enjoy the immunity from liability in tort which surrounds the actions of all judges while acting within their jurisdiction (*d*). Yet no law dealing with the liability of local authorities seems to have developed before the middle of the nineteenth century. Perhaps this is in part explicable when it is remembered to what a small extent local government involved interference with private rights.

(*b*) See below, p. 384.

(*c*) *Per Lopes, L.J.*, in *Royal Aquarium etc. Society v. Parkinson* [1892] 1 Q.B. 431, p. 452; 16 Digest 98, 5; cf. *O'Connor v. Waldron* [1935] A.C. 76; Digest Supp.

(*d*) *Royal Aquarium etc. Society v. Parkinson* [1892] 1 Q.B. 431, pp. 443, 448, 453.

The nineteenth century stripped the justices of the greater part of their local government functions, and introduced elected local authorities and Central Departments, performing between them work comparable, though on an enlarged scale, to that previously performed by the justices. In other words, the justices were superseded by bodies which in their constitution bore no resemblance to courts of law and which performed no functions which could be regarded as strictly judicial in their nature.

This change at once raised two important questions. Were the new administrative bodies, which had taken over the justices' local government work, to be subject to the judicial control exercised over their predecessors, and were they to be recognised as having immunity from liability in tort?

“Judicial” nature of Local Government.—The first question has been answered in the affirmative. The eighteenth century had seen in practice a clear line drawn between the judicial and the administrative functions of quarter sessions, and yet the law courts had persisted in regarding the latter functions as still “judicial.” Hence the mere change in the persons exercising these functions could not affect their true nature. The result has been that a large number of “decisions” in the sphere of local government are still regarded as “judicial,” and subject to the control exercised by the courts. In this respect, the fact that modern statutes have in many cases given a superior position and wider discretionary powers to Central Departments than to local authorities has led the courts to regard the Departments as, in effect, “judicial bodies,” standing in a position analogous to that of quarter sessions regarded as an appeal tribunal from petty or special sessions or individual justices, and so to subject their activities to judicial control.

Legal Remedies available against the Central Government.—The second question has been more difficult to answer. The growth in the numbers and powers of Central Depart-

ments has led to attempts to find a legal remedy against the Crown, whose servants these Departments are in law. This was found in the revival of the old procedure by petition of right; but the results have not been entirely satisfactory. This is not the place in which to consider in detail the rules governing petitions of right (*f*); it is sufficient to say that the Crown cannot be sued, or driven into Court against its own wishes. Hence the suppliant is confined to the presentation of a petition of right asserting that, but for this procedural immunity surrounding the person of the Sovereign, an action would lie against the Crown. If he is successful in obtaining the *fiat* of the Attorney-General, the further prosecution of the petition follows the ordinary course of litigation, subject to certain modifications flowing from the advantages derived by the Crown from the Prerogative. This form of procedure is available when the subject has a claim against the Crown arising out of contract (*g*), but as the Crown can do no wrong, it will not lie in any case in which the suppliant's claim rests upon the commission of a tort, even if it is alleged to have been committed by a Crown servant acting in the course of his employment (*h*). In the latter case, the individual Crown servant, who actually committed, or expressly authorised the tort, is personally liable in his private capacity, and cannot plead superior orders as a defence (*i*). Neither the superior officer, nor the head of the Department, nor even the Department itself is liable for the tort in the absence of express authorisation, for the relation of master and servant does not exist between them and the actual tortfeasor, since they are all

(*f*) See, e.g., Wade and Phillips, *Constitutional Law*, Part VII, Ch. V; Keir and Lawson, *Cases in Constitutional Law*, Ch. VI.

(*g*) *Thomas v. R.* (1874) L.R. 10 Q.B. 31; 16 Digest 237, 320; the person actually making the contract as agent for the Crown is not, in accordance with the ordinary principles of agency, personally liable on it: *Gidley v. Lord Palmerston* (1822) 3 Brod. & B. 275; 1 Digest 655, 2729.

(*h*) *Viscount Canterbury v. A.-G.* (1843) 1 Ph. 306; 16 Digest 239, 351; *Tobin v. R.* (1864) 16 C.B.N.S. 310; 16 Digest 240, 352; *Feather v. R.* (1865) 6 B. & S. 257; 16 Digest 236, 319.

(*i*) *Raleigh v. Goschen* [1898] 1 Ch. 73; 38 Digest 63, 379. He cannot be sued in his official capacity—i.e. by the name of his office—for this would indirectly be making the Crown liable for the wrong.

in law fellow servants of the Crown (*j*). It seems probable also that the immunity of the Crown from liability in tort extends to cover those Departments of Government which have been incorporated, so as to prevent them from being sued as individual corporations (*k*). In the result, however, a petition of right will alone lie against the Crown in respect of a contract made on its behalf, but in tort an action will only lie against the individual tortfeasor sued as a private individual. Hence, broadly speaking, the Central Departments charged with the supervision of local government are immune from liability at the suit of aggrieved persons (*l*), and the latter are left to their remedy against the individual civil servant whom they allege to have injured them.

Legal Liability of Local Authorities.—When this same question came to be considered in relation to the new elected local authorities a different answer was given, but not without some hesitation. Those bodies obviously could not claim immunity on the ground that they were courts, for neither their constitution nor the fact that many of their “decisions” had come to be looked upon as technically “judicial” for the purpose of subjecting them to review could be regarded as fitting them to claim inclusion within this category. But on the other hand it remained for some time an open question whether they would not be entitled to claim that the immunity of the Crown extended to protect them, as well as Central Departments, from liability in tort. This question was finally

(*j*) *Bainbridge v. Postmaster-General* [1906] 1 K.B. 178; 38 Digest 74, 528.

(*k*) See *Mackenzie-Kennedy v. The Air Council* [1927] 2 K.B. 517; 38 Digest 63, 387; *Roper v. Public Works Commissioners* [1915] 1 K.B. 45; 38 Digest 61, 364. The matter is not, however, free from difficulty; but the Minister of Transport is an exception to the general rule: *Ministry of Transport Act, 1919*, § 26. However, it was held in *Minister of Supply v. British Thomson-Houston Co.* [1943] K.B. 478, C.A., that if a statute which enables a Minister to contract for the Crown also enacts that he may institute or defend any action in respect of such contract, or enables him to sue or be sued upon a contract made by him on behalf of the Crown, an action will lie against the Minister for breach of contract; if an action is brought by the Minister the defendant may counter-claim.

(*l*) And also in contract: see *Gilleghan v. Minister of Health* [1932] (1 Ch. 86; Digest Supp.

decided in *Mersey Docks & Harbour Board Trustees v. Gibbs* (*m*). There the Trustees, who were sued for negligence, strenuously argued that, as they were set up by statute solely for the performance of duties owed to the public and were not allowed to make any profit out of the funds at their disposal, these funds were immune from liability in tort. The House of Lords, however, rejected this argument, and held that the funds of the Trustees were liable for the payment of damages, just as would be the funds of a profit-making corporation; though Lord Wensleydale in his opinion cast a longing eye upon the contrary doctrine, which would have rendered all public bodies free from liability for torts committed in the course of their public duties. Since this decision local authorities have been recognised as being in no better position, in respect of liability to pay damages, than are trading corporations whose funds belong and whose profits go to their members (*n*).

Limitation of Judicial Control.—To turn to the present law, it is clear that the subject can only question the conduct of a local authority, or for that matter of a Government Department, by alleging that some illegality has been or is about to be committed by it. The courts have never claimed an unrestricted power of controlling the activities of public authorities; they are solely concerned with the due observance of the law. Broadly speaking, a local authority may commit an illegality in one of two ways: it may exceed its powers, or it may fail to carry out its duties. Both these powers and these duties must be conferred upon it by statute (*o*) and, since Parliament is a sovereign body and able to alter the law at its will, it is obvious that, if a local authority strictly confines itself within the limits of its powers and duly performs its

(*m*) (1866) L.R. 1 H.L. 93; 38 Digest 35, 209.

(*n*) In the absence of some act involving them in such a liability, the members of a local authority are not personally liable. The liability falls to be discharged out of the funds of the local authority and its powers of rating may be lawfully exercised in order to provide for such a liability: *Galsworthy v. Selby Dam Drainage Commissioners* [1892] 1 Q.B. 348; 13 Digest 361, 963.

(*o*) See above, Ch. XII.

duties, it cannot properly be charged with any illegal action, and cannot in consequence be successfully brought before the courts by any person conceiving himself to be aggrieved by its activities. Once, however, it exceeds its powers or disregards its duties, its action becomes illegal and may be challenged by the use of appropriate remedies.

The scope of control exercised over local authorities by the law courts can be determined, therefore, by the consideration of two questions : what are the powers and duties conferred by law upon local authorities, and what are the legal remedies which may be employed for questioning the legality of their actions ? To answer the first question completely would involve a statement of all the powers and duties cast upon local authorities by the still largely chaotic and undigested mass of piecemeal legislation which goes to make up the body of local government law, and this task cannot be undertaken here. Our attention must therefore be confined to the remedies which the law provides. But in at least one respect these remedies are intimately bound up with the important distinction between "judicial" and other powers and duties, for, as we shall see, certain remedies are only available for controlling the exercise of "judicial" functions and have been used so as to create a body of law laying down the principles which are to govern the exercise of all powers and duties of this class.

Legal Remedies for controlling Local Authorities.—It will be convenient to consider here, in general outline, what legal remedies the law provides for controlling the activities of local authorities. In the first place, if a local authority exceeds its powers its action becomes illegal. In some cases this illegality will amount to a tort actionable at the suit of a private individual entitling him to claim damages or, in a proper case, an injunction. In other cases no private rights are infringed and no tort is therefore committed. In this latter class of case equitable remedies may be available and an injunction or a declaration may be claimed, sometimes by an individual and sometimes only by the Attorney-General.

Again, in a certain class of case, where it is alleged that the excess of power relates to the election of a person to a public office, as for instance that of councillor, the prerogative writ of *quo warranto* formerly might serve to challenge his right to hold office (*p*), while now a special remedy is provided by the Local Government Act of 1933 (*q*). Lastly, if it is a "judicial" power which has been exceeded, proceedings for an order of prohibition or for an order of *certiorari* may be taken in the High Court to obtain the annulment of the "decision" (*r*).

Secondly, where it is desired to compel the performance of a duty which it is alleged has been left undischarged, a similar array of remedies is available, each on its appropriate occasion. In some cases it may be that the omission infringes a private right and gives rise to a private right of action for a tort. In others, where private rights are not affected, any one of three remedies may be obtainable (*s*). Sometimes an indictment for misdemeanour may be appropriate. Sometimes an action by the Attorney-General for a mandatory injunction or declaration may be employed, and sometimes an order of *mandamus* may be available (*t*).

Now it is obvious that, to consider the judicial control of local authorities in more detail, it will be convenient to discard the arrangement outlined above; for that arrangement will involve a considerable amount of overlapping and repetition, in particular in relation to the private right of action for tort and to the action for an injunction or declaration. In place of an arrangement which is based on the distinction between excess of powers and omission to perform duties, it will be

(*p*) *Quo warranto* is abolished and replaced by an injunction by the Administration of Justice (Miscellaneous Provisions) Act, 1938, § 9.

(*q*) §§ 71 and 84; see above, p. 119.

(*r*) These remedies supersede the prerogative writs of prohibition and *certiorari*, abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938, § 7.

(*s*) E.g. the Public Health Act, 1925, § 19 (1), which requires urban authorities which have adopted the Act to put up the names of streets within their areas. No private right is infringed by a failure to perform this duty, and no special penalty is prescribed by the Act.

(*t*) Replacing the prerogative writ of *mandamus*: Administration of Justice (Miscellaneous Provisions) Act, 1938, § 7.

better to consider simply the different classes of remedies, noting in each case the matters which may be appropriately dealt with by the particular remedy in question.

Looked at from this point of view the short historical sketch undertaken earlier in this chapter indicates that a dividing line should be drawn between those remedies on the one hand which are available for enabling the courts to review the "decisions" of local authorities and Central Departments, to prevent any excess of powers, and to compel positively the performance of their duties, and those remedies on the other hand which relate rather to private rights of action. The former class of remedy produces what may be called judicial control in the narrow sense. Secondly, the liability of local authorities in tort and in contract must be dealt with. It must be noted, however, that when litigation of this sort results from any of their activities, in fact the courts are to some extent controlling local authorities, and that this class of proceeding should properly also be brought under the heading of judicial control in its broadest sense.

CHAPTER XVII

JUDICIAL CONTROL OF LOCAL GOVERNMENT

Restricted Nature of Judicial Control.—We have seen that the changes effected during the nineteenth century in the bodies, whether local or central, administering or controlling local government, have not of themselves taken away the previously existing judicial control exercised by the courts. Judicial control is, of course, subject to certain limitations inherent in its very nature. The control exercised by Parliament, from the character of the body exercising it, can know no limits, since parliamentary sovereignty may be employed to make new law. Administrative control exercised by Central Departments, though it must be limited within the bounds defined by statute, can at least extend into the sphere of policy. Judicial control, however, can neither make new law nor adequately consider policy. The courts are limited to the bare law they administer ; they can, at most, prevent any excess or misuse of powers, or compel the performance of duties.

Methods of exercising Judicial Control.—The methods by which judicial control in the narrow sense is exercised must first obtain our consideration, in order that we may see how the machinery at its disposal limits this form of control within a comparatively narrow sphere. In its broadest sense the term judicial control would cover all the forms in which questions relating to local government or local authorities could come before the courts. Ordinary actions for damages arising out of contract or tort would not be excluded, but, though whenever they are relevant entirely similar principles

are applied in such cases as well as in those proceedings which are to be considered in this chapter, it is simpler to deal with ordinary actions separately (*a*). Here we shall confine ourselves to the four methods by which the courts exercise judicial control in its narrow sense, that is, to proceedings which expressly call in question the "decisions" of local authorities or Central Departments. These include some forms of actions for injunctions and declarations, indictments, the proceedings, which under the Administration of Justice (Miscellaneous Provisions) Act, 1938, have taken the place of the prerogative writs, and statutory appeals.

1. Actions for Injunctions and Declarations.—An injunction is an order of the court restraining the commission or ordering the doing of some specified act ; while a declaration is a simple authoritative statement of the plaintiff's rights and does not of itself provide any method of enforcing them, this latter process being frequently left to an ancillary injunction. Actions for injunctions and declarations may be employed in two cases. In the first place, these forms of relief may be sought by a private plaintiff either as additional to, or in lieu of damages. We are not here concerned with this class of case, for the plaintiff is basing his case upon either an actual or a threatened infringement of his private rights, and the matter is more properly dealt with elsewhere. Secondly, however, actions for injunctions or declarations may be maintained in respect of acts alleged to be *ultra vires* the public body committing or threatening to commit them or otherwise to interfere with public rights, and this procedure forms one of the methods by which direct judicial control may be obtained over local authorities. In this class of case, however, a distinction must be drawn between those actions which may be maintained by a private plaintiff, and those which can only be undertaken at the suit of the Attorney-General acting as the proper officer charged with the protection of public rights.

(*a*) See below, Ch. XIX.

By Private Plaintiff.—The general rule is that the Attorney-General as representing the public alone can sue where public rights or interests are concerned; but, apart from statutory provisions (*b*), there are two exceptions to this rule. These are set out in *Boyce v. Paddington Borough Council* (*c*). This case recognises that a private plaintiff may sue, without joining the Attorney-General, when either the interference with public rights is such that some private right of his own is at the same time interfered with, or, though no private right is infringed, the plaintiff in respect of his public right suffers special damage peculiar to himself from the interference with the public right.

Both these exceptions may be illustrated from cases dealing with unlawful obstruction of the public right of passage along a highway. An owner of premises abutting on the highway is, in general (*d*), entitled as a private right to obtain ready access to the highway from his premises, and if the obstruction to the highway also obstructs his private right of access he may sue without joining the Attorney-General (*e*). If there is no such private right infringed, an individual cannot sue merely because he has been inconvenienced in his passage along the highway, but, if he can show some additional special damage peculiar to himself and other than that suffered by the rest of the public, he may sue in his own name without the necessity of making the Attorney-General a party (*f*).

By the Attorney-General.—Apart from these two exceptional cases, the Attorney-General must be a party to proceedings claiming an injunction or declaration relating to the rights or interests of the public.

(*b*) These are discussed below, p. 387.

(*c*) [1903] 1 Ch. 109, p. 114; 16 Digest 488, 3701; the point was not dealt with on appeal: [1906] A.C. 1.

(*d*) As to the limitations on this right imposed by the Restriction of Ribbon Development Act, 1935, see below, p. 574.

(*e*) *W. H. Chaplin & Co., Ltd. v. Westminster Corporation* [1901] 2 Ch. 329, p. 334; 16 Digest 489, 3713.

(*f*) See *Winterbottom v. Lord Derby* (1867) L.R. 2 Ex. 316; 26 Digest 293, 251; *Benjamin v. Storr* (1874) L.R. 9 C.P. 400; 26 Digest 425, 1441.

“ The Attorney-General takes proceedings as the representative of the public, for he represents the Crown and the Crown represents the public ” (g).

The maintenance of such actions by the Attorney-General is rather a fiction of procedure than a reality, for usually he does not act of his own motion, but permits the use of his name by a private relator. This requirement, however, which prevents a private individual from suing alone, does produce a salutary check upon unnecessary or vexatious litigation, for, although in the majority of cases the Attorney-General is only a nominal plaintiff acting on the relation of some private individual, it is essential that his consent should be obtained before litigation of this class is undertaken (h).

Cases in which Procedure is available.—Apart from statute the cases in which this procedure is available are two in number. Actions for injunctions or declarations may be maintained either to prevent the infringement of some public right, or to restrain public bodies from acting *ultra vires*. The former type of case is illustrated by a public nuisance committed, for instance, by a wrongful interference with the public right of passage over a highway ; while the latter may be instanced by an action by the Attorney-General at the relation of a ratepayer to restrain a local authority from making an *ultra vires* payment.

This form of procedure may, however, be utilised by local authorities themselves, for they may, by setting the Attorney-General in motion, find a convenient method of preventing the infringement of public rights in whose maintenance they are interested. For instance, they may be the relators in cases seeking to restrain the commission of public nuisances within their areas. But this is by no means the only case in which they may find this procedure indispensable. The jurisdiction

(g) *Per Channell, J., in A.-G. and Spalding Rural District Council v. Garner* [1907] 2 K.B. 480, p. 485 ; 16 Digest 482, 3635.

(h) The Attorney-General has an absolute discretion to decide whether he will permit the use of his name in any particular case : *London County Council v. A.-G.* [1902] A.C. 165 ; 16 Digest 482, 3637.

to grant an injunction is not confined to cases in which an action for damages would also lie, nor is it excluded by the fact that some special, even criminal remedy has been created.

The bye-laws of local authorities are enforceable by the recovery in a court of summary jurisdiction of a penalty in general not exceeding five pounds ; but this may prove an entirely inadequate remedy, especially in cases where the profit to be derived from a breach far exceeds the penalty, or where, as in the case of building bye-laws, infringement is of a continuing nature (*j*). Especially where this summary remedy is inadequate an injunction to restrain breach of bye-laws may be obtained by the Attorney-General suing on the relation of the local authority concerned (*k*). A similar course may also be adopted when a penalty prescribed by a statute for a breach of its provisions is found to be inadequate. Thus in *Attorney-General v. Sharp* (*l*) the defendant was a proprietor of omnibuses and had been refused a licence to run a service within the area of a borough. He nevertheless found it profitable to run his omnibuses within the borough boundaries, and to pay almost daily the fines which statute prescribed for this offence. In these circumstances the Court of Appeal held that there was jurisdiction in an action by the Attorney-General on the relation of the municipal corporation to grant an injunction restraining the defendant from running his omnibuses within the borough (*m*).

But local authorities in availing themselves of this remedy by injunction are in no more favoured position than private individuals. They may sue in their own names only in cases in which the general rule would sanction such a course being

(*j*) Though to some extent this is met by the modern practice of providing for a penalty for each day during which the bye-law continues to be broken after conviction ; see, *e.g.*, Local Government Act, 1933, § 251. See also Public Health Act, 1936, § 65.

(*k*) *A.-G. v. Ashborne Recreation Ground Co.* [1903] 1 Ch. 101 ; 16 Digest 486, 3632.

(*l*) [1931] 1 Ch. 121 ; Digest Supp.

(*m*) The merit of an injunction in these and similar cases is that it may, if necessary, be mandatory—*i.e.* ordering something positive to be done, such as the demolition of buildings erected in breach of bye-laws—and that, in any case, disregard of the injunction may be followed by imprisonment for contempt of court.

adopted by an individual plaintiff (n). In all other cases they must procure the Attorney-General to sue on their relation, for the law does not recognise local authorities as having any peculiar interest in the maintenance of public rights or the prevention of breaches of statutory provisions in their areas, entitling them to sue without obtaining the Attorney-General's sanction. Though in a proper case an injunction may be obtained to restrain persistent or continuing breaches of a local authority's bye-laws, this can only be done in an action in the name of the Attorney-General, for the local authority has not such an interest even in the enforcement of its own bye-laws as will enable it to sue alone (o).

2. Indictment.—A second method, by which in some cases judicial control may be exercised over local authorities, is by indictment for the commission of a criminal offence. The law has found many difficulties in attempting to impose a criminal liability upon corporations, in general preferring to concern itself solely with the actual offenders than to allow them to be shielded behind an entity which cannot feel very acutely the pains of criminal punishment.

However, though it may still be uncertain to what precise extent corporations are subject to the true criminal law, there is no doubt that in the sphere of quasi-crime, where the criminal law shades off into the civil, corporations may properly be proceeded against in criminal forms. This is especially so in the cases of public nuisance and failure to perform statutory duties.

(n) Cf. *Coulsdon and Purley Urban District Council v. Surrey County Council* [1934] Ch. 694; Digest Supp., where the question whether a rating authority could sue, without joining the Attorney-General, to restrain *ultra vires* action of a precepting authority, which affected the amount of its precept, was raised but not decided.

(o) *Devonport Corporation v. Tozer* [1903] 1 Ch. 759; 16 Digest 489, 3720. Conversely a private individual may, without joining the Attorney-General as a party, obtain an injunction to restrain a local authority from enforcing bye-laws, void for unreasonableness, where such enforcement would interfere with his property. In such a case the plaintiff's private right is alone in question, the injunction being asked for to prevent the commission of what, if completed, would be a tort; *Repton School Governors v. Repton Rural District Council* [1918] 2 K.B. 133; 28 Digest 472, 799.

Public nuisance includes, within its almost generic subject-matter, such misdemeanours as obstruction of, or failure to perform the duty of repairing highways, and, as an alternative to obtaining the consent of the Attorney-General to the maintenance of an action for an injunction or declaration, a private individual may still find a remedy in such cases by a prosecution instituted against the responsible local authority. Indeed during the eighteenth century the only method of compelling parishes to perform their highway duties was by indicting them at quarter sessions, and the judicial forms, in which quarter sessions were originally required to carry out their local government functions, were developments from this type of procedure.

Indictment may also be available as a remedy for failure to perform duties imposed by statute, for as a general principle it may be stated that disregard of a statute is a misdemeanour.

“Where a duty is created by statute which affects the public as the public, the proper remedy if the duty is not performed is to indict or take the proceedings provided by the statute” (*p*).

But this statement, in the second alternative it mentions, points to the limitations upon the general principle. An indictment is only maintainable if it is the intention of the Legislature that this procedure should be available, and this is a matter to be determined by the judicial construction of the statute in question. Generally the statute is silent upon this point. If it provides no special remedy for enforcing its provisions, the general rule, that an indictment will lie, may apply; but if it does provide a special remedy, in general the procedure by indictment is excluded, and the special remedy may alone be used (*q*).

3. Proceedings replacing the Prerogative Writs.—As their name implies, the prerogative writs of *habeas corpus*, *quo warranto*, *mandamus*, prohibition and *certiorari* were

(*p*) *Clegg Parkinson & Co. v. Earby Gas Co.* [1896] 1 Q.B. 592, p. 594; 42 Digest 753, 1776.

(*q*) See *R. v. Hall* [1891] 1 Q.B. 747; 42 Digest 731, 1531.

originally part of the machinery by which the Crown exercised control over its officers and courts; but, by that inversion by which the prerogative was turned from an engine of tyranny into a convenience for popular government, they came in time to be available as a means by which the subject could obtain protection from the Crown in its modern extended sense of the Executive Government.

We may pass by the writ of *habeas corpus*, which alone remains and which, as perfected by statute, has become the practical guarantee of personal liberty, for, apart from the cells attached to police stations and only used for temporary detention, local government is no longer concerned with the maintenance of gaols.

The other prerogative writs were, however, of importance in local government law; indeed the growth of legislation, under which powers and duties interfering with individual rights were created, brought the question of judicial control into prominence and so led to an increase in their use. But the rules governing their issue were antiquated and only to be found in the comparatively unfamiliar branch of law known as Crown practice. The Committee on Ministers' Powers significantly remarked,

"We would direct attention to the fact that procedure by way of *certiorari*, prohibition and *mandamus* is archaic and in some ways cumbrous and inelastic, and we would suggest the expediency of introducing a simpler, cheaper and more expeditious procedure" (r).

This suggestion has finally been incorporated in the Administration of Justice (Miscellaneous Provisions) Act, 1938, which abolishes *quo warranto*, *mandamus*, prohibition and *certiorari* and substitutes for them a simpler procedure more akin to ordinary litigation and leading, if successful, respectively to an injunction, an order of *mandamus*, an order of prohibition and an order of *certiorari* (s). Thus the substance of the law remains the same while the names of the remedies are changed to mark the simplification of their procedure.

(r) Cmd. 4060/1932, p. 62.

(s) §§ 7-10.

But even before this sweeping measure of reform the tendency to replace the prerogative writs by a simpler form of judicial control was apparent. Many of the express statutory rights of appeal to the courts considered hereafter (*t*), were introduced directly to supersede the prerogative writs. One or two illustrations will suffice.

Under the Poor Law Amendment Act, 1844 (*u*), and the Public Health Act, 1875 (*v*), a person aggrieved by a decision of the district auditor, instead of appealing to the Minister of Health, might apply to the King's Bench for a writ of *certiorari* (*w*). This in effect gave an appeal to the High Court from the auditor. The Audit (Local Authorities) Act, 1927 (*x*), substituted for the *certiorari* a direct appeal to the High Court from the auditor's decision. Similarly, orders of a borough or county council, directing payments to be made out of the general rate fund of the borough or the county fund, might formerly be removed by *certiorari* into the King's Bench, where they might

"be wholly or partly disallowed or confirmed on motion or hearing, with or without costs, according to the judgment and discretion of the court" (*y*).

The Local Government Act of 1933, however, replaced *certiorari* by giving any person, aggrieved by such an order for payment, a right to appeal to the High Court, and provides that

"on any such appeal the High Court may give such directions in the matter as they think proper, and the order of the High Court shall be final" (*z*).

Similarly where under the earlier legislation (*a*) *mandamus* was the appropriate method for enabling the High Court to order, in certain circumstances, the holding of an election for

(*t*) See below, p. 397.

(*u*) §§ 35 and 36.

(*v*) § 247.

(*w*) See above, p. 205.

(*x*) § 2. Now Local Government Act, 1933, § 229.

(*y*) Municipal Corporations Act, 1882, § 141; Local Government Act, 1888, § 80.

(*z*) Local Government Act, 1933, §§ 184 and 187.

(*a*) Municipal Corporations Act, 1882, § 70; Local Government Act, 1888, § 75.

a borough or county council, now under the Local Government Act, 1933 (*b*), in such cases

“the High Court may order an election to be held on a day appointed by the Court.”

Since, however, the substance of the law has in all these cases remained unaltered, it will be convenient to consider it by reference to the various remedies which have been substituted for the older prerogative writs.

(a) **Injunctions replacing *Quo Warranto*.**—The actual writ of *quo warranto* has long been obsolete, having been superseded by the “information in the nature of a *quo warranto*.” This called upon a person to show by what title he claimed to usurp an office or franchise (*c*). The office or franchise must, however, be created by charter or statute; and it must be of a public nature (*d*). This procedure was not available where the holder was a mere deputy or servant dismissible at pleasure (*e*), nor where he was not in actual possession of the office (*f*). The information in the nature of a *quo warranto* is abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938 (*g*), its place being taken by proceedings for an injunction and declaration. But this general change in the law does not seem to have affected local authorities, because in the sphere of local government *quo warranto* has already been superseded. The Municipal Corporations Act, 1882 (*h*), which applied to all local authorities (*i*), prevented an election from being questioned by *quo warranto* whenever an election petition would lie.

(b) § 72.

(c) *Darley v. R.* (1846) 12 Cl. & Fin. 520; 16 Digest 353, 1827.

(d) *R. v. St. Martin's Guardians* (1851) 17 Q.B. 149; 16 Digest 355, 1854.

(e) *Ex parte Richards* (1878) 3 Q.B.D. 368; 16 Digest 355, 1852.

(f) For instance, where an election was a total nullity, the proper remedy was not *quo warranto*, but *mandamus* to hold an election: *Re Barnes Corporation. Ex parte Hutter* [1933] 1 K.B. 668; Digest Supp. In this case *mandamus* has been replaced by a direct order of the Court: Local Government Act, 1933, § 72.

(g) § 9.

(h) § 87.

(i) Local Government Act, 1888, § 75; Local Government Act, 1894, § 48.

The effect of this provision was that in the cases where an election could be challenged on an election petition the employment of an information in the nature of *quo warranto* was excluded (*j*). Similarly, even in cases where *quo warranto* was not thus excluded, an election to a borough (*k*) or county council (*l*) could only be questioned, either by election petition or by *quo warranto*, within twelve months after its holding.

These provisions, however, only prevented the use of *quo warranto* for challenging an election and had no application where the validity of an election was not in question, but it was alleged that after election the holding of the office was unlawful. Thus *quo warranto* would lie against a councillor when it was alleged that a disqualification had continued since, or had only arisen after his election (*m*).

New Procedure in respect of Qualification.—The Local Government Act, 1933, completed the supersession of *quo warranto* as a method of challenging membership of a local authority. It first provides that an election

“ unless questioned by election petition within the period fixed by law for those proceedings, shall be deemed to have been to all intents a good and valid election ” (*n*).

Secondly, it provides machinery for questioning the right of a person to act as a member of a local authority or as mayor or elective auditor of a borough where it is alleged that he is not qualified, or is disqualified or has ceased to hold the office (*o*). Within six months after so acting (*p*), proceedings may be commenced, either in a court of summary jurisdiction for penalties or in the High Court for a declaration and injunction.

(*j*) *R. v. Morton* [1892] 1 Q.B. 39; 16 Digest 360, 1909.

(*k*) Municipal Corporations Act, 1882, § 73.

(*l*) Local Government Act, 1888, § 75.

(*m*) *R. v. Beer* [1903] 2 K.B. 693; 4 Digest 177, 1647; see above, p. 118.

(*n*) Local Government Act, 1933, § 71. As to election petition, see above, p. 115.

(*o*) Local Government Act, 1933, § 84.

(*p*) That is, six months after first acting in the office: *Bishop v. Deakin* [1936] Ch. 409; [1936] 1 All E.R. 255; Digest Supp.

If proceedings are commenced in a court of summary jurisdiction, then either that court or the High Court on the application of the defendant may order the discontinuance of the proceedings on the ground that the case would more properly be dealt with in the High Court. If the defendant has not actually acted in the office in question, but merely claims to be entitled to do so, proceedings may only be brought in the High Court for an injunction and declaration. Proceedings to question the right to hold office, whether in a court of summary jurisdiction or the High Court, may only be brought by a local government elector for the area of the local authority concerned.

Lastly, the Act expressly prohibits the bringing of any other proceedings, "whether by way of information in the nature of a *quo warranto* or otherwise," on the ground that a person has acted or claimed to be entitled to act as a member of a local authority or as a mayor or elective auditor of a borough.

(b) Orders of *Mandamus*.—Bowen L.J. in *R. v. Commissioners of Inland Revenue. In re Nathan* (q) gave a definition of *mandamus* which has become classical. He said :

"A writ of *mandamus*, as everybody knows, is a high prerogative writ, invented for the purpose of supplying defects of justice. By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of *mandamus* is granted to enable justice to be done."

The writ itself is abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938 (r) which substitutes for it a simpler procedure leading to an order of *mandamus*. In substance, however, the law remains unchanged.

This procedure is available to command any person, corporation, or inferior court to perform some public duty lying upon them, and is enforceable by attachment and fine

(q) (1884) 12 Q.B.D. 461, p. 478; 16 Digest 276, 894.

(r) §§ 7-8.

as for contempt of court (s). The duty which it is sought to enforce must be one of a public nature, but may be one imposed either by statute or by the common law.

The Crown is not amenable to this procedure, for the Crown is immune from the process of the courts, nor will an order of *mandamus* be made on a Crown servant to compel him to perform a duty which falls upon him in his character as a servant of the Crown (t). But where there are imposed on Crown servants or Departments of State public duties which are owed to subjects, an order of *mandamus* may be made to compel their due performance (u).

In many cases, therefore, this procedure is available to compel either Central Departments or local authorities to carry out their duties. But it will only lie to compel the performance of an absolute duty, and has no application to a case where the duty is discretionary. In more technical language, an order of *mandamus* is only available to compel the performance of an absolute ministerial duty; but this limitation must not be allowed to obscure the true scope of the remedy. Even a court of law, though in general engaged in the performance of judicial duties, has an absolute ministerial duty to hear and determine the cases properly brought before it (v), and similar principles govern authorities on whom rests the duty to make decisions in the sphere of local government (w). But the order is not available to control the decision given: it will not lie to compel the giving of a particular decision, for that would be to interfere with a judicial duty involving the exercise of a discretion. A local authority cannot be ordered to approve

(s) As a corporate body obviously cannot be committed to prison, refusal to obey the order in such cases may be followed by proceedings personally against those members of its governing body who are instrumental in procuring the refusal to comply with its terms: *R. v. Poplar Borough Council* (No. 2) [1922] 1 K.B. 95; 13 Digest 411, 1307.

(t) *R. v. Lords Commissioners of the Treasury* (1872) L.R. 7 Q.B. 387; 16 Digest 303, 1160.

(u) *R. v. Commissioners for Special Purposes of Income Tax* (1888) 21 Q.B.D. 313; 16 Digest 306, 1181; *R. v. Commissioners for Special Purposes of Income Tax* [1920] 1 K.B. 26; 16 Digest 351, 1810.

(v) *Ferguson v. Lord Kinnoull* (1842) 9 Cl. & Fin. 251; 38 Digest 80, 568.

(w) Cf. *R. v. Minister of Health. Ex parte Rush* [1922] 2 K.B. 28.

building plans, when it has considered and *bona fide* decided to reject them for a lawful reason (x). But a failure to apply the law in coming to a judicial decision may be so flagrant as to amount to a refusal to perform the ministerial duty to hear and determine the matter, and so may be a proper subject for an order of *mandamus*. If a local authority in approving building plans imposes illegal conditions, it may be ordered to give a proper decision, for the decision it has come to is illegal, and so in effect no decision at all (y).

The applicant for an order of *mandamus* must show that he has a legal right to require the performance of the duty and that his right, like the duty, is of a public nature. A merely private right cannot be enforced in this way: only a right derived from the fact that the applicant is a specially interested member of the public to whom the duty is owed will suffice.

Sometimes jurisdiction to make the order is given by statute, as for instance under § 299 of the Public Health Act, 1875 (z), which made a default order of the Minister of Health enforceable in this way (a). The procedure is only available where there has been not merely a failure to perform, but a wilful non-performance of the duty. This the applicant must prove by showing a demand followed by a refusal to perform the duty. Lastly, the making of an order of *mandamus* is discretionary: the court is not compelled to make it in every case. On this ground it is settled that the procedure is not available where the applicant has any other remedy (b), at any rate where the alternative remedy is "equally convenient, beneficial and effectual" (c), nor where its issue would be futile.

(x) *Smith v. Chorley Rural District Council* [1897] 1 Q.B. 678; 16 Digest 322, 1337.

(y) *R. v. Tynemouth Rural District Council* [1896] 2 Q.B. 451; 26 Digest 554, 2497.

(z) Now Public Health Act, 1936, § 322. (a) See above, p. 361.

(b) Even an extra-judicial remedy, as by application to the Minister of Health to exercise his default powers: *Pasmore v. Oswaldtwistle Urban District Council* [1898] A.C. 387; 16 Digest 302, 1150.

(c) *Re Barlow* (1861) 30 L.J.Q.B. 271; 16 Digest 292, 1043. E.g. the remedy by prosecution of the officer refusing to permit inspection of a document is not "equally convenient, beneficial and effectual," and an order of *mandamus* may be made: *R. v. Bedwelty Urban District Council*. *Ex parte Price* [1934] 1 K.B. 333; Digest Supp.

An order of *mandamus* thus forms a residuary remedy available to compel a local authority or a Central Department to perform its public duties of a ministerial, and not a judicial nature (*d*), though it cannot be employed to control a decision properly come to.

Action for *mandamus*.—The Common Law Procedure Act, 1854, permitted a plaintiff to claim a *mandamus* in an ordinary action, when the court might make an order commanding the duty to be performed. The relation between this statutory form of relief and the order replacing the prerogative writ may not be completely clear, but certain distinguishing features may be noticed. The procedure by action does not permit of the enforcement of a purely private duty by this procedure—as, for instance, the enforcement of a contract—but it is not confined to cases in which the prerogative writ was formerly available. It is settled that the claim in an ordinary action is only permissible where the plaintiff has already a right of action, and it is intended to be utilised as an ancillary form of relief (*e*). The result is that, to make the statutory action available, the plaintiff must have a personal right of action arising out of the non-fulfilment of at least a quasi-public duty. For instance, it is available as a means of compelling a local authority to levy a rate in order to satisfy a judgment obtained against it by the plaintiff (*f*). Apart from these matters an action appears to be governed by the rules applying to proceedings claiming an order of *mandamus* where formerly the prerogative writ was available.

(c) Orders of Prohibition and *Certiorari*.—The prerogative writs of prohibition and *certiorari* are abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938 (*g*), and replaced by orders of prohibition and *certiorari*

(*d*) See *Glossop v. Heston and Isleworth Local Board* (1879) 12 Ch. D. 102; 16 Digest 316, 1293.

(*e*) *Smith v. Chorley Rural District Council* [1897] 1 Q.B. 678, p. 540; 16 Digest 322, 1337.

(*f*) *Worthington v. Hulton* (1865) L.R. 1 Q.B. 63; 38 Digest 597, 1277.

(*g*) § 7.

respectively. The order of prohibition, as its name implies, prohibits an inferior court from continuing proceedings in excess of its jurisdiction or otherwise contrary to law. Similarly the order of *certiorari* removes the record of proceedings of an inferior court in order that the King's Bench Division may do what is right thereon. Thus it is available for enabling the High Court to examine into the activities of an inferior court and quash its decision if in excess of jurisdiction or otherwise contrary to law.

It will be at once apparent that proceedings for an order of prohibition and for an order of *certiorari* have much in common; indeed it has been said that both forms of procedure deal with excess of jurisdiction, and, except that an order of prohibition may be claimed at an earlier stage, they are both governed by the same rules (*h*). In other words the principles governing the making of these two orders are the same, save that the order of prohibition prevents an inferior court, which has not yet reached a final decision, from proceeding in excess of jurisdiction or contrary to law, while an order of *certiorari* removes the final decision, when made in such circumstances, and quashes it. Hence it is convenient to deal with these two remedies together.

In some cases the right to claim an order of *certiorari* is given by statute.

Thus § 142 of the Poor Law Act, 1930, impliedly grants the right to remove into the High Court by order of *certiorari* a rule, order or regulation made by the Minister of Health under that Act. In other matters, the rules governing the making of orders of prohibition and *certiorari* are identical. Lord Justice Atkin in *R. v. Electricity Commissioners* (*i*) thus explained the use of the former prerogative writs :

“ Both writs are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal

(*h*) *R. v. Electricity Commissioners* [1924] 1 K.B. 171, p. 206 ; 20 Digest 197, 1.

(*i*) [1924] 1 K.B. 171, pp. 204-205 ; 20 Digest 197, 1.

from proceeding further in excess of jurisdiction; *certiorari* requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

"Judicial" Functions.—The extension here referred to from the control of actual courts of law to other bodies exercising powers of decision, has come about largely through the fact that these prerogative writs were formerly employed to supervise the work of quarter sessions, both in its strictly judicial and in its administrative functions. When the latter class of work was transferred to bodies bearing no resemblance to courts, it still retained its legal quality of being "judicial," and still remained subject to the control of the High Court exercised through these writs.

Unlike an order of *mandamus*, which compels performance of a ministerial duty, orders of prohibition and *certiorari* control only the performance of "judicial" duties.

But again the meaning of "judicial" in this connection is not clearly defined. The modern tendency is to extend the employment of these orders to enable the courts to control bodies which by statute are given powers of imposing obligations on individuals (*j*). This is only possible where those bodies must act "judicially," but

"... the phrase 'judicial act' must be taken in a very wide sense, including many acts which would not ordinarily be termed 'judicial.' ... The procedure of *certiorari* applies in many

(*j*) *R. v. Local Government Board* (1882) 10 Q.B.D. 309, p. 321; 16 Digest 375, 2130.

cases in which the body whose acts are criticised would not ordinarily be called a court, nor would its acts be ordinarily termed 'judicial acts.' The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of *certiorari* does not apply. . . . In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at common law" (k).

There must be a legal right or duty to decide. Thus the Cinematograph Act, 1909 (l), provides for the licensing of premises for the display of cinematograph performances in which inflammable films are used. But the Act is so framed as to show that licences can only be granted in respect of existing premises: it confers no right to grant anything in the nature of a provisional licence in respect of a building not yet erected. Hence it has been held that where justices meet for the purpose of considering the plans of an intended cinema with a view to informing the applicant whether on its erection they will grant a licence, they are not acting in a judicial capacity and an order of *certiorari* cannot be made to quash their intimation that a licence will not be granted (m).

There must, however, be more than a power to decide: the decision must be one affecting the rights of individuals or imposing duties or obligations (n). These rights or duties need not, it seems, be in any sense private rights or duties of the individuals affected: it is sufficient that their rights as citizens should be in jeopardy. Thus the right granted by

(k) *Per* Fletcher Moulton L.J. in *R. v. Woodhouse* [1906] 2 K.B. 501, p. 535; 16 Digest 398, 2421; reversed on other grounds *sub nom. Leeds Corporation v. Ryder* [1907] A.C. 420.

(l) §§ 2 and 5. See below, p. 779.

(m) *R. v. Barnstaple Jf. Ex parte Carder* [1938] 1 K.B. 385; [1937] 4 All E.R. 263; Digest Supp. Nor, as they have no duty to decide, can an order of *mandamus* be made.

(n) Obviously this definition is defective in so far as it attempts to define the action of true courts of law, which do not affect rights, any more than by declaring them already to exist; see D. M. Gordon, "Administrative Tribunals and the Law Courts," *Law Quarterly Review*, vol. xlix (1933), pp. 102-104. It emphasises rather the action of many quasi-judicial bodies which, while not bound to apply strict rules of law in reaching a decision, must yet reach that decision in a judicial spirit: see *Report of the Committee on Ministers' Powers*, Cmd. 4060/1932, p. 73 ff.

statute for the public use of an open space is sufficient (o). A definition of a "judicial act," which has been frequently approved either expressly or by implication, is that of May C.J. in the Irish case of *R. v. Dublin Corporation* (p):

"It is established that the writ of *certiorari* does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection the term 'judicial' does not necessarily mean acts of a judge or of a legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others" (q).

Without attempting at the present place further to distinguish between "judicial" powers which are, and "ministerial" powers which are not, within the control of orders of prohibition and *certiorari*, we must notice that in the sphere of local government law they are of most frequent use in supervising the activities of Central Departments, since they afford a means of attacking the exercise of many powers either of sub-legislation or of a more apparently judicial nature. The exercise of some forms of delegated legislation may fall within the limits of "judicial functions" and, on the ground that there is an excess of jurisdiction, it may be prohibited or quashed if *ultra vires* (r). Thus the Minister of Health in confirming a scheme made by a local authority for slum clearance under the Housing Act, 1925, acted judicially and could be controlled by these means (s). Similarly, many modern statutes have, as we

(o) *R. v. Minister of Health. Ex parte Villiers* [1936] 2 K.B. 29; [1936] 1 All E.R. 817; Digest Supp.

(p) (1878) 2 L.R. Ir. 371, p. 376.

(q) Care must be taken to remember the distinction between the two meanings of the word "judicial," see above, p. 370. Orders of *certiorari* and prohibition are available for controlling the actions both of inferior courts of law in the true sense and of administrative tribunals, but in their application to the latter class of bodies they are utilised in a somewhat less stringent manner, see below, p. 420.

(r) See above, p. 325, as to the powers of Ministers to legislate and the methods that have been frequently adopted to exclude the control otherwise exercisable by orders of prohibition and *certiorari*.

(s) *R. v. Minister of Health. Ex parte Davis* [1929] 1 K.B. 619; Digest Supp.

shall see presently (t), conferred upon Ministers and Central Departments powers of adjudicating in certain classes of disputes, and these powers must be exercised judicially under the control of orders of prohibition and *certiorari*.

In a proper case, however, orders of prohibition and *certiorari* may be made even on bodies engaged in local administration. An assessment committee, though not a court of law, must nevertheless act in a judicial manner, and its proceedings in so far as they offend against this principle may be controlled by these orders (u). Even local authorities may find their activities directly controlled by these writs. In exercising licensing functions they must act judicially and not exceed the powers under which alone they may act (v). But even in coming to some other decisions, though they do not act judicially in the strict sense (w), yet they must act in a judicial manner, and there is no reason for limiting the control exercised over them by the courts to an order of *mandamus*: in a proper case orders of *certiorari* or prohibition may issue to a local authority (x).

4. Statutory Appeals.—In many cases the powers conferred by statute on local authorities so obviously affect the interests of individuals that Parliament has seen fit to provide some special safeguard against their illegal or even unfair exercise by expressly giving a right of appeal. Moreover such statutory rights of appeal have been conferred in some cases even where the combined action of local authorities and of Central Departments is alone effective to interfere with private rights. This practice is in many cases an implied

(t) See below, p. 407.

(u) *R. v. North Worcestershire Assessment Committee* [1929] 2 K.B. 399; Digest Supp. (prohibition); *R. v. North-East Surrey Assessment Committee* [1933] 1 K.B. 776; Digest Supp. (*certiorari*); *R. v. Salford Assessment Committee. Ex parte Ogden* [1937] 2 K.B. 1; [1937] 2 All E.R. 98; Digest Supp. (prohibition).

(v) *R. v. London County Council* [1931] 2 K.B. 215; Digest Supp.

(w) *Davis v. Bromley Corporation* [1908] 1 K.B. 170; 33 Digest 22, 93.

(x) *R. v. Hendon Rural District Council. Ex parte Chorley* [1933] 2 K.B. 696; Digest Supp.; *Cooper v. Wilson* [1937] 2 K.B. 309; [1937] 2 All E.R. 726; Digest Supp.

admission that the powers of local authorities ought to be exercised subject to control by the Courts without the necessity of requiring the individuals affected to take proceedings either for an injunction or for one of the orders replacing the prerogative writs. Indeed in many cases statutory rights of appeal to the Courts have been given in direct replacement of the prerogative writs (*y*). These statutory appeals take many forms: both the tribunal to which the appeal lies and the scope of the appeal itself—whether it is in effect a rehearing or is limited to some particular point of law—vary from statute to statute. Some typical illustrations may, however, be given.

(a) **Appeals to Justices.**—In earlier times, when the justices of the peace were directly concerned in local government, it was natural that appeals from the decisions of local authorities should be made to lie to the justices. But even modern statutes have retained a court of summary jurisdiction as an appeal tribunal (*z*). The scope of such appeals varies. Thus under the Private Street Works Act, 1892 (*a*), the appeal does not confer on the justices the right to review the whole decision of the local authority nor to exercise powers which the local authority might, had it chosen to do so, have exercised (*b*). Yet, apart from questions of law and procedure, the appeal expressly extends to cover certain matters where the reasonableness or sufficiency of the works proposed are material. In the same way, the Public Health Act, 1936 (*c*), provides that in general where a local authority serves a notice requiring the execution of works by a private individual, the latter may appeal to a court of summary jurisdiction on a number of specified grounds, which include the question of the reasonableness of the works or the time within which the notice

(*y*) See above, p. 386.

(*z*) *E.g.* Town and Country Planning Act, 1932, §§ 12 and 47; Public Health Act, 1936, § 290.

(*a*) §§ 7 and 8.

(*b*) *Hornchurch Urban District Council v. Webber* [1938] 1 K.B. 698; [1938] 1 All E.R. 309; Digest Supp.; *Allen v. Hornchurch Urban District Council* [1938] 2 All E.R. 431; 54 T.L.R. 1063; Digest Supp.

(*c*) § 290.

requires them to be executed. On the other hand the Town and Country Planning Act, 1932 (*d*), makes provision for an appeal in certain circumstances to a court of summary jurisdiction from a decision of the authority responsible for enforcing a planning scheme relating to the design or external appearance of buildings. Here it seems obvious that the court can review the whole decision of the authority and, if necessary, substitute its own opinion on the question.

Sometimes, again, an appeal is given directly to quarter sessions. For instance the Public Health Act, 1925 (*e*), provides for an appeal to quarter sessions against an order of a local authority declaring an existing highway to be a new street for the purpose of applying bye-laws thereto.

(b) Appeals to the County Court.—The Housing Acts have provided a variation on statutory appeals to the local justices, by granting a right of appeal in certain cases to the local county court. This innovation was first introduced by the Housing Act, 1930 (*f*), and does not seem to have been sufficiently successful to be extended to other cases. The provisions governing this statutory appeal are now contained in § 15 of the Housing Act, 1936. That Act empowers a local authority to make orders in respect of insanitary houses requiring either the execution of repairs, or the demolition of a house or the closing of part of a house. In each case a person aggrieved is granted a right of appeal to the county court. In exercising jurisdiction under this section the county court judge re-hears the whole question and can not only substitute his opinion for that of the local authority, but may also exercise the alternative powers vested in the local authority (*g*).

(c) Appeals to the High Court.—We have already had occasion to notice illustrations of statutory appeals to the High Court. The appeal given to a person aggrieved by the

(*d*) § 12.

(*e*) § 30.

(*f*) § 22.

(*g*) *Fletcher v. Ilkeston Corporation* (1931) 48 T.L.R. 44; Digest Supp.

order made by a county or borough council for payment of money out of the county or general rate fund (*h*) affords an instance of such an appeal on a point of law from a decision of a local authority. The statutory appeal given by the Housing Act, 1936 (*i*), to a person aggrieved by a clearance or compulsory purchase order is an example of a class of appeal becoming frequent in modern legislation where the combined action of a local authority and a Central Department is open to challenge. Such appeals are, however, strictly limited in scope. The High Court can only quash the order either if it is not within the powers of the Act under which it is made, or if the interests of the appellant have been substantially prejudiced by a failure to comply with some requirement of the Act (*j*). A narrower form of appeal occurs in those cases where a Department can be required to state a case for the opinion of the High Court in reference to some matter being dealt with by it. Instances occur in the case of appeals against surcharges by the district auditor (*k*) and in the settlement of disputes by the Minister of Health as to the right of an employee of a local authority to claim a superannuation allowance (*l*). Obviously in such cases the appeal to the court is confined to a pure question of law.

Before considering in detail the rules which the courts have developed for the exercise by administrative bodies of "judicial" functions, it is as well to take stock of the general position created by the existence of the remedies by which a judicial control in its narrow sense is maintained over local government, and these matters will form the substance of the succeeding chapter.

(*h*) Local Government Act, 1933, §§ 184 and 187.

(*i*) § 26, and 1st and 2nd Schds.

(*j*) See above, p. 333.

(*k*) Local Government Act, 1933, § 229.

(*l*) Local Government Superannuation Act, 1937, § 35.

CHAPTER XVIII

ADMINISTRATIVE LAW

Administrative Law in France and England.—Hitherto Administrative Law has been a term unknown to the English legal system, but the development of legislative and judicial or quasi-judicial powers exercised by the executive organs of the State has forced upon us the realisation that a new branch of the law is coming into existence and that by analogy to continental practice it can most conveniently be called Administrative Law. In continental countries in general, Administrative Law, dealing as it does with matters of administration, has depended upon two principles previously entirely foreign to English jurisprudence; on the one hand the administrator and his acts are immune from the jurisdiction of the ordinary courts of law, but on the other hand this immunity is prevented from leading to extravagant excesses by the existence of another set of administrative courts, which alone have jurisdiction to control the actions of the Executive. A special system of law, applied by a special system of courts, comes into force whenever a public officer is concerned.

To the Englishman of the last generation this continental organisation seemed no less than monstrous (a): immunity of officials from the jurisdiction of the ordinary courts spelt despotism; and he could hardly imagine that discipline, much less public liberty, could be obtained through courts staffed by men who were themselves officials. The whole system violently infringed English conceptions of the sphere

(a) See, e.g., Dicey, *Introduction to the Study of Constitutional Law*, Ch. XII.

of judicial action, and made the ordinary law court a subservient respecter of persons with official positions.

In fact, however, the Frenchman, for instance, does not find the system so unsatisfactory as might be thought. Indeed, he looks aghast at our judicial arrangements and is amazed on the one hand that the Executive will tolerate judicial interference, and on the other hand that the courts can remain pure and uncorrupted when they may have to concern themselves with the legality of administrative action.

The explanation of this apparent paradox is simple. The judicial organisation of each country is dependent upon its own history and upon the men recruited to its Bench. In England judicial control of public authorities has long prevailed and has become identified in the minds of lawyers, if not of the whole people, with popular liberty. Our judges are, moreover, appointed from the practising Bar, and bring with them to the Bench the traditions of independence which have characterised the conduct of their professional lives as barristers. In France, on the other hand, judges are in little different position from civil servants: they have served no apprenticeship at the Bar: and promotion lies in the hands of a purely executive Minister. Moreover, the French courts are many in number, and the judicial eminence which characterises the holders of English high judicial office is lacking from a country in which the judiciary is numerous and widely scattered among the people. Again, the doctrine of the Separation of Powers—that legislative, executive and judicial functions ought to be kept rigidly distinct—has been interpreted in France to mean that the Executive should not be hampered in its actions by judicial control, and that the judiciary should not be subjected in arriving at its decisions to the influence which might be wielded by the Executive (*b*).

Hence in France subordinate legislation and other forms of administrative action are controlled by administrative courts, but, so far from having suffered themselves to become the complacent tools of the Executive, these courts are among

(*b*) See R. C. K. Ensor, *Courts and Judges*.

the most powerful and highly respected judicial bodies in the country. They have built up for themselves a position of great independence, and administer a far wider and more stringent control over all administrative acts and decisions than is possible for the English courts to obtain by the employment of the remedies at their disposal. In France the administrative courts have become the bulwark of the citizen against official tyranny, and the Frenchman cannot see how the ordinary courts of England can furnish anything like as effective a protection (c).

The Rule of Law.—The orthodox answer to the Frenchman's doubt is that the control of the ordinary courts over the exercise of all public authority prevents the possibility of the illegal abuse of power. But two factors serve to make the protection thus afforded at best incomplete. While powers of delegated legislation are in general subject to the control of the courts which can hold any *ultra vires* exercise of them to be void, the sovereignty of Parliament secures for statutes total exemption from judicial review. In fact the sovereignty of Parliament has been employed in modern times to confer powers of delegated legislation in such a form that judicial control is excluded from their exercise (d). Again, the control of the courts over the exercise of "judicial" powers by administrative bodies is, as we shall see, fragmentary, and may again be totally excluded by statute.

The fact that there exists in England a control exercised over administration by the ordinary courts of law is one of the most important characteristics of that Rule, or Supremacy of Law, which Dicey regarded as a keystone of the English Constitution. Dicey attributed various meanings to the expression "the Rule of Law," some of which could only with difficulty be defended (e); but he pointed out that

(c) See, e.g., Barthélemy, *Le Gouvernement de la France*, Ch. X, § II.

(d) See above, pp. 327-332.

(e) Dicey, *op. cit.*, Ch. IV. For instance, the assertion that there is no arbitrary power vested in the Executive Government outside the ordinary law. See W. I. Jennings, *The Law and the Constitution*.

in England the general rules of Constitutional Law are the result of the ordinary law of the land. In other words, there is no difference in quality and, indeed, no distinction recognised as existing between public and private law, for all law is equally a matter for the ordinary courts and is dealt with by them in the same way. In short the exercise of all forms of public authority is subjected to the control of the ordinary law courts.

Its Development.—This principle of the Rule of Law is not in reality so self-evident as might at first sight appear to an Englishman who has had no experience of any other constitutional system, for its characteristics are in marked contrast to the practice of continental nations. The principle had its historical origin in the common mediaeval idea that some form of law should rule the world. The rise of Parliament meant the modification of this idea to suit English circumstances, and in this country the principle was enunciated that the law was supreme, but that Parliament could alter it. The Reformation, particularly on its political side, led to the rise of the modern independent sovereign State recognising no rules as binding upon it, and to the consequent abandonment of the mediaeval idea of a universal law. On the Continent the result was the rapid growth, as in France, of a royal absolutism which produced a sharp distinction between the ordinary private law existing between subject and subject, and the arbitrarily created public or administrative law, administered in special tribunals upon special principles and favouring the State and its officers in their conflicts with private citizens. In England the very real danger that such a system might develop was averted by the Civil War, and consequent abolition of the Star Chamber, and by the Revolution of 1688, so that here supremacy is still accorded to the ordinary law of England as administered in the ordinary courts and whether unenacted or enacted by Parliament (f). The retention of the Rule of Law

(f) See *Report of Committee on Ministers' Powers*, Cmd. 4060/1932, pp. 71-72.

in England has been rendered largely possible by the historical development of our system of judicature, which enabled the ordinary courts to perform work which in other countries would go before administrative tribunals, and so saved us from the necessity of recognising the existence of a separate administrative law. The courts of Common Law early in our history developed into separate bodies distinct from the *Curia Regis*, out of which they were derived, and left the latter body to grow into the King's Council. Of these three Common Law courts the King's Bench was the last to acquire a separate existence, and for long remained associated with the Council, that is, with the Executive Government (*g*). This, coupled with the fact that it was the court especially concerned with the causes interesting the King, served to make the King's Bench the court from which were issued the prerogative writs, controlling inferior courts and royal officers. With the rise to power of the justices of the peace these writs acquired even greater importance and were used to effect a central control over the justices, in their capacity both of an inferior court and of royal officers, and hence tended to assist the confusion between strictly judicial and administrative functions. But by this time the King's Bench had long been divorced from the Executive, and had come to regard itself as purely a judicial body. Consequently, the tendency to "judicialise" the whole process of control and to treat it as the normal function of an ordinary law court acquired great force and further assisted the growth of the Rule of Law.

Limits of Judicial Control.—It is, however, important to notice that, though the control acquired by the King's Bench through the prerogative writs has become "judicialised," it is in many cases of its exercise in essence an administrative process: in reality a court of law is exercising administrative functions, and, as that court's procedure and habits of thought become more judicial, the administrative control it exercises becomes more rigid. A court cannot hope successfully to travel

beyond the narrow field of supervising the due application of the law. It must confine itself to seeing that powers duly conferred are not exceeded, and cannot adequately attempt to control the actual manner in which they are exercised. It can say that an act is *ultra vires* and, therefore, void ; but it cannot properly control the policy brought into play in the *intra vires* exercise of properly acquired powers (*h*). Its control is necessarily narrow. In another way also judicial control from its nature must be unsatisfactory, for the procedure of courts requires that certainty in the law shall be obtained by a system of recognising the binding force of precedent. No room for progressive expansion, any more than for the unfolding of policy, can be found under an inflexible control exercised by law courts.

Exclusion of Judicial Control.—In modern times with the wide expansion of local government services, the unsatisfactory nature of judicial control has become evident to politicians and administrators, and attempts have been made to exclude or to supersede it by the introduction of administrative action. These have, it must be admitted, made considerable inroads upon the Rule of Law, but they have indirectly been compelled to pay homage to that principle. The Rule of Law, involving as it does the equality of all persons before the ordinary law courts, requires the public officer, no less than the private citizen, to justify his acts, in so far as they interfere with others, by pleading that they are lawful. English law, in other words, knows no defence of "Act of State," so far at any rate as acts in England are concerned (*i*). The public officer must plead the legality of his action, and cannot defend himself by asserting that he was acting in the public interest and in his capacity as an officer of State. Consequently, whenever it is necessary to confer powers upon public servants which will enable them to interfere with private rights, it is

(*h*) Hence the unsatisfactory nature of the appeal to the County Court given by the Housing Act, 1936, § 15. See above, p. 399.

(*i*) *Entick v. Carrington* (1765) 19 St. Tr. 1029 ; 11 Digest 510, 119 ; *Johnstone v. Pedlar* [1921] 2 A.C. 262 ; 38 Digest 10, 39.

essential that these powers should be so conferred as to become part of the law, for otherwise the ordinary law courts will prevent the officer from acting. To confer powers in this form, and so render them immune from restraint in the courts, the sovereignty of Parliament must be invoked, for the courts cannot question the validity of a statute, but are confined to a scrutiny of action taken under it in order to see that the powers conferred have not been exceeded and have been properly exercised.

Growth of Administrative Justice.—But Parliament may be induced to go further ; powers may be given by statute in such a form as altogether to exclude even this control by the courts, and, moreover, powers of adjudication upon disputes may be given by statute to bodies other than the ordinary courts of law. Both these processes have in modern times been going on side by side. One class of cases we have already considered, when it was shown how statutes have conferred upon Government Departments powers of delegated legislation free from judicial control (*j*). The other sphere in which an administrative law has been thrust upon us by statute lies in the modern practice of granting to Ministers or Central Departments powers of determining disputes, often without the possibility of judicial control by the courts.

This process of conferring powers of adjudication upon the Executive instead of the judiciary is in reality not so surprising as might at first sight appear. It has been seen that Ministers and Departments in many cases exercise administrative control over local authorities (*k*), but the line between administration and adjudication cannot be clearly drawn, and powers which from one point of view may appear to be administrative may from another appear to be judicial. Central control, therefore, easily strays from the pure field of administration into what has hitherto been the preserve of the law courts. For instance, the many Acts, which require local authorities to obtain the consent of the Minister of Health or other Department before

(*j*) Above, Ch. XIV.

(*k*) Above, Ch. XV.

undertaking some activity, may seem to create a solely administrative control, but in effect, particularly if some private individual is to be affected by the proposed action of the local authority, the obtaining of Ministerial consent may easily take on the appearance of a judicial process between the local authority and the citizen concerned, the Minister acting as judge. Once this step has been taken it is almost inevitable that powers avowedly judicial should be conferred, since for the decision of technical disputes administrative officers are often felt to be more competent, as well as less trammelled by legal procedure than the law courts. Powers of both these types have in fact been conferred in three classes of cases, instances of each of which we must consider.

(i) **Disputes between Local Authorities.**—In the first place, what are in effect disputes between two or more local authorities are often left for settlement to a Minister or Central Department. Thus, a dispute between two or more local education authorities as to which of them is responsible for the provision of education for any pupil, or whether contributions in respect of the provision of education for any pupil are payable by one local education authority to another, is to be determined by the Minister of Education (*l*). Similarly, a parish council in certain circumstances may request the county council to empower it to acquire land compulsorily. Thereupon the county council after holding an inquiry may make a compulsory purchase order; but, if it refuses to do so, the parish council may petition the Minister of Health, who after holding a local inquiry may make the desired order (*m*). Thus again the Minister is made into an appeal tribunal from the county council. Many instances of more directly judicial powers to settle disputes between local authorities may be given. The Minister of Health may determine disputes between the appointing authorities as to the apportionment of the expenses of a joint committee for planning (*n*); the Minister of Transport may

(*l*) Education Act, 1944, § 67 (2).

(*m*) Local Government Act, 1933, § 168.

(*n*) Town and Country Planning Act, 1932, § 3 (6).

determine certain differences arising between county and district councils as to roads (*o*) and is the person to whom lies an appeal by a district council from a refusal of a county council to declare a road to be a county road (*p*).

(ii) Disputes between a Local Authority and its Officers.—Disputes between local authorities may be regarded as the proper subject-matter of administrative justice, for the element of administrative discretion far outweighs the judicial nature of the proceedings. On similar grounds it is easy to concede the application of this method to the settlement of disputes between a local authority and its officers or subordinates. Instances of this class of power are to be found in the sphere of police and education. The power to dismiss constables is vested in different authorities in the case of borough and county forces respectively. In boroughs the watch committee or two justices of the peace may suspend a constable and the watch committee may dismiss (*q*), but in counties it is the chief constable who may dismiss (*r*). In both cases, however, a constable is given the right to appeal against his dismissal to the Home Secretary (*s*).

In some cases, a Government Department is given power to determine a dispute even where it relates to the exercise, or refusal to exercise, a power which is contingent upon the opinion of the local authority (*t*).

(iii) Disputes between a Local Authority and Private Individuals.—In the third place, in many cases statutes have given to Ministers powers to hear and determine disputes between a local authority and a private individual. The justification for this development is to be found in the fact that many of the activities of local authorities involve interference with

(*o*) Local Government Act, 1929, §§ 29–36.

(*p*) *Ibid.*, § 37.

(*q*) Municipal Corporations Act, 1882, § 191; *Cooper v. Wilson* [1937] 2 K.B. 309; [1937] 2 All E.R. 726; Digest Supp.

(*r*) County Police Act, 1839, § 6.

(*s*) Police (Appeals) Act, 1927.

(*t*) See, for example, the Education Act, 1944, § 67 (1), with regard to disputes between a local education authority and the managers or governors of a school.

private rights, and it is desirable that some form of appeal should exist as a check upon excessive zeal, if not unfairness or possibly corruption. In the statutes of earlier times these appeals were as a matter of course referred to the justices, partly because of their judicial position and partly because of their close connection with local government in their character as the county authority. The practice of giving an appeal to the justices, though it still exists in some cases (*u*), has in modern times been frequently superseded by appeals to Administrative Departments or to *ad hoc* tribunals, because often the substance of the appeal relates not so much to matters of strict law as of fact, or such vague things as policy, convenience or expediency, and even at times involves the exercise of a merely administrative discretion. Moreover, the subject-matter of these disputes is often technical and their decision by the Executive differs little in its effect, at any rate upon the local authority concerned, from the administrative control already flowing from the same source. The law courts, it is felt, are too expensive and dilatory in their procedure to afford an adequate protection to the individual citizen, and they are in addition constitutionally unsuited for the determination of disputes involving technical matters in which the elastic development of a unifying policy may be desirable. Hence the tendency has been for these powers to increase, and at the same time to take on a different character, for now they are not confined to matters of fact but may involve the decision of questions of law. At the present day, however, it may be thought that these powers of a judicial nature conferred upon Departments have passed their zenith and the tendency seems to be to favour the courts or a specially constituted appeal tribunal for the settlement of administrative disputes (*v*).

(*u*) See above, p. 398.

(*v*) See, for example, Part III of the Education Act, 1944, which provides for the registration of independent schools (schools not maintained by the local education authority or in receipt of grants from the Minister of Education), and for the reference of complaints to an Independent Schools Tribunal created under the Act.

Powers of this type may be hidden under purely administrative or legislative forms. Thus, a local authority wishing to purchase land compulsorily for certain authorised purposes may make a compulsory purchase order for submission to a Central Department. After adequate notices have been given to the property owners affected, the Department may confirm the order, but, in the event of objection only after holding a local inquiry. In effect, therefore, the confirmation of the order may easily become a species of administrative litigation between the local authority and the property owner carried on before the Department (*w*).

Powers of this nature are, however, given in a more directly litigious form. The Minister of Health's power to hear appeals from the district auditors—and incidentally his power of remission of a lawfully made surcharge—need only be mentioned here (*x*).

The Restriction of Ribbon Development Act, 1935, again gives an administrative appeal to the Minister of Transport. Under that Act restrictions are imposed on the development of land immediately adjoining certain highways and on the making of new accesses to such roads without the consent of the highway authority (*y*). A landowner aggrieved by the decision of the highway authority may appeal to the Minister of Transport, who must, if required by either the appellant or the highway authority, hold a local inquiry. This case is also interesting because the Minister must in giving his decision publish a summary of the facts as found by him and of his reasons for the decision (*z*).

The above-mentioned powers are merely illustrative of a vast number of cases in which modern legislation has set up what is in effect administrative litigation. These powers may vary from little more than rough and ready arbitration between two local authorities disputing about a comparatively unimportant and technical detail of administrative practice, to a process little different in its essential qualities from purely

(*w*) See, *e.g.*, Local Government Act, 1933, § 161.

(*x*) See above, pp. 205-207.

(*y*) §§ 1 and 2.

(*z*) § 7.

judicial proceedings determining the rights of private individuals. In the form in which they are granted, they may similarly vary from what at first sight may appear to be legislative or administrative, to frankly judicial processes. Moreover judicial functions may be indissolubly mixed with the administrative or legislative; the appropriate Department may have to determine in the first place what is the strictly legal position, in order to enable it to exercise its discretion whether to bring into play purely administrative powers. For instance, on an appeal from the district auditor to the Minister of Health, the latter has first to decide according to law whether the surcharge in question is properly made. If he decides this question affirmatively, he may then decide administratively whether to exercise his power of remission (a).

Judicial Control.—Now in the present place we are concerned to see the manner in which the courts control judicial and quasi-judicial powers of the types we have just been describing. Whatever the form of procedure prescribed may be, if in essence it fell within the sphere of “judicial” action as that term is interpreted by the law, the prerogative writs of prohibition and *certiorari* were applicable to obtain a control by the ordinary courts. Largely through the employment of these writs the courts have developed a series of rules applicable to “judicial” powers; but these rules are not peculiar to the now obsolete prerogative writs. Whenever the courts are concerned with the exercise of discretionary powers affecting the rights of individuals and whatever form the legal proceedings before them may take, the same rules are applied. Thus certain general principles have been developed which govern the exercise by public authorities of the statutory powers conferred upon them, and which apply by whatever appropriate form of procedure a case may be brought before the courts. If the power which is in question is obviously “judicial” in its nature, a claim for an order of prohibition or *certiorari* may be the proper proceeding in which to raise the issue: in other

(a) See above, p. 207.

cases proceedings claiming an order of *mandamus*, an action for a declaration or injunction, some appropriate form of statutory appeal to the courts, or even an ordinary action for damages may be the proper remedy. In each case, however, the same general principles will be applied.

Principles applied in exercising Judicial Control.—On analysis it seems that three points must be kept distinct in considering this matter (*b*). In the first place, if a discretion affecting private rights is given by statute to a public body, the courts, in the absence of express provisions giving a right of appeal to them, have no power to substitute their own judgment for that of the body to which Parliament has seen fit to confide the right to decide. As Lord Halsbury L.C. said in *Westminster Corporation v. London and North Western Railway Company* (*c*):

“Assuming the thing done to be within the discretion of the local authority, no Court has power to interfere with the mode in which it has exercised it. Where the Legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any Court to contest that discretion. Of course, this assumes that the thing done is the thing which the Legislature has authorised.”

Secondly, however, though the courts cannot control the discretion itself, they can control the manner in which the decision it involves is reached. The general principles upon which the courts act in exercising this control were admirably stated by Lord Macnaghten (*d*). He said:

“It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good

(*b*) On the whole question see D. M. Gordon, “Administrative Tribunals and the Courts, II,” *Law Quarterly Review*, vol. xlix (1933), p. 419.

(*c*) [1905] A.C. 426, p. 427; 38 Digest 232, 616.

(*d*) *Westminster Corporation v. London and North Western Railway Company* [1905] A.C. 426, p. 430; 33 Digest 55, 338. Cf. *Spackman v. Plumstead Board of Works* (1885) 10 App. Cas. 229, p. 240; 26 Digest 505, 1913.

faith. And it must act reasonably. The last proposition is involved in the second, if not in the first."

Again, speaking of the requirement of reasonableness, he added (e) :

"It seems to me that when a public body is exercising statutory powers conferred upon it for the benefit of the public it is bound to have some regard to the interests of those who may suffer for the good of the community. I do not think it is right—I am sure it is not wise—for such a body to keep its plans secret and carry them into execution without fair and frank communication with those whose interests may possibly be prejudiced or affected."

But, thirdly, it must be noticed that the first point may, in certain cases, override the second. The discretion itself, which the courts cannot control, may be so wide in its terms as entirely to exclude any attempt to control even the manner in which it is exercised. This is the explanation of the courts' inability to control the exercise of purely legislative (f) or absolute ministerial powers. The extent of a discretion, which will often be a matter of construction of the statute under which it is exercisable, will therefore determine whether the rules now to be considered are applicable.

(i) **Must be *intra vires*.**—The principles stated by Lord Macnaghten as governing the exercise of statutory powers of a judicial or quasi-judicial nature may be reduced to two. The first of these rules is that there must be no excess of jurisdiction, in the ordinary sense of that expression : the act done must not be *ultra vires*. For instance, a Minister has been prohibited from confirming a scheme for slum clearance, which purported to enable the local authority preparing it to exercise powers over property, which the statute in question did not authorise (g). Again, to be *intra vires*, the procedure prescribed for

(e) P. 433.

(f) *R. v. Legislative Committee of the Church Assembly. Ex parte Haynes Smith* [1928] 1 K.B. 411 ; Digest Supp. ; *North Charterland Exploration Company* (1910), Ltd. v. R. [1931] 1 Ch. 169 ; Digest Supp. Though, of course, the sovereignty of Parliament prevents the courts from controlling the exercise of legislation in Parliament.

(g) *R. v. Minister of Health. Ex parte Davis* [1929] 1 K.B. 619 ; Digest Supp. Cf. *R. v. London County Council* [1931] 2 K.B. 215 ; Digest Supp.,

the exercise of the power must be strictly followed. Thus where a local authority served a closing order under § 17 of the Housing, Town Planning etc. Act, 1909, upon the owner of a dwelling-house on the ground that it was unfit for human habitation, and omitted a note at the foot of the statutory form of order calling attention to the owner's right of appeal, it was held that this omission, being of a material part of the order, rendered the proceedings invalid (*h*). Lastly, a power to decide a dispute, though framed in wide terms, is inherently limited to the subject-matter of the dispute itself, and cannot justify a decision travelling beyond the particular question submitted for decision. Thus where on an appeal to the Minister of Transport against the grant of a road service licence, the Minister has power "to make such order as he thinks fit," he cannot use this power to order something which neither the appellant nor the respondent ask for (*i*).

(ii) **Natural Justice.**—But it is not sufficient that the powers should not be exceeded, for, secondly, in their exercise the rules of "natural justice" must be observed. This phrase "natural justice" is neither a meaningless platitude nor the boundless generality which advocates, at a loss for an argument, have sometimes attempted to make of it. It is a technical phrase denoting certain definite principles (*j*), and embraces three sub-rules.

where it was held that a power to grant cinema licences could not be properly exercised so as to dispense with the provisions of the Sunday Observance Act, 1780 (see now Sunday Entertainments Act, 1932); and *R. v. Minister of Health. Ex parte Villiers* [1936] 2 K.B. 29; [1936] 1 All E.R. 817; Digest Supp., where the Minister was prohibited from considering an application to appropriate land for housing purposes in breach of a local Act.

(*h*) *Rayner v. Stepney Corporation* [1911] 2 Ch. 312; 38 Digest 212, 471. This decision remains a valuable illustration of the principle, although under later housing legislation the actual point dealt with is no longer applicable; see *Arlidge v. Tottenham Urban District Council* [1922] 2 K.B. 719; 38 Digest 214, 489, where the form of order under the Housing, Town Planning etc. Act, 1919, did not require the insertion of this note, and the earlier case was in consequence distinguished; *Re Bowman* [1932] 2 K.B. 621; Digest Supp., as to the effect of the provisions of the Housing Act, 1936, in this type of case. See above, p. 333.

(*i*) *R. v. Minister of Transport. Ex parte Upminster Services, Ltd.* [1934] 1 K.B. 277; Digest Supp.

(*j*) See *Report of Committee on Ministers' Powers*, Cmd. 4060/1932, pp. 75-80.

(a) *Bias*.—The first principle of natural justice is that a man may not be judge in his own cause, or, to put it in its more practical form, bias in a judge is a ground for invalidating his decision. Bias may arise from pecuniary interest in the suit (*k*), or even from circumstances, such as kindred to one of the parties or other cause, showing a real likelihood of partiality being present (*l*). Thus in *R. v. Sunderland Justices* (*m*), a decision of justices, who were members of a borough council and as such had actively supported the proposal out of which the matter adjudicated upon arose, was held to be invalid on the ground of bias. Bias will not be assumed without showing the existence of some cause from which it can be inferred as a real likelihood, but it must be remembered that “it is not merely of some importance but is of fundamental importance that justice should not only be done, but manifestly and undoubtedly be seen to be done” (*n*). So it would be improper for an assessment committee, which had appointed as its clerk an officer in the employment of the rating authority, to allow him to remain in attendance and advise it on points of procedure and law while it was coming to a decision in a case between the rating authority and a ratepayer (*o*).

(b) *Audi alteram partem*.—The second rule of natural justice is summed up in the maxim *audi alteram partem*: for judicial proceedings to be good a party must be given adequate notice of the case against him and an opportunity to be heard in his defence. The application of this rule may be illustrated by reference to cases relating to local authorities, which also clearly show that these principles governing the exercise of judicial functions are applied by the courts in whatever form the question comes before them. In *Cooper v.*

(*k*) *Dimes v. Grand Junction Canal* (1852) 3 H.L.C. 794; 11 Digest 273, 2005.

(*l*) *R. v. Rand* (1866) L.R. 1 Q.B. 230; 16 Digest 427, 2869.

(*m*) [1901] 2 K.B. 357; 33 Digest 296, 109.

(*n*) Per Lord Hewart C.J. in *R. v. Sussex Justices. Ex parte McCarthy* [1924] 1 K.B. 256, p. 259; 33 Digest 294, 97.

(*o*) *R. v. Salford Assessment Committee. Ex parte Ogden* [1937] 2 K.B. 1; [1937] 2 All E.R. 98; Digest Supp.

Wandsworth Board of Works (p), the defendant authority, having power by statute to demolish houses erected in its area without its consent, proceeded to demolish the plaintiff's house. The plaintiff sued in trespass, and the court held that the power of demolition was a "judicial" one, and, as the plaintiff had been given no opportunity to be heard before the defendant authority had acted, the power had been improperly exercised, the defendant's action was in consequence illegal, and the plaintiff was entitled to damages. Similarly, though the remedy sought was not damages but an injunction, the same principle was applied in *Broadbent v. Rotherham Corporation* (q). In that case the defendant corporation had made a demolition order under § 18 of the Housing, Town Planning etc. Act, 1909, in respect of certain premises of the plaintiff, which were unfit for human habitation. The Act permitted the corporation to postpone the operation of the order if the plaintiff undertook to effect such repairs as would, in the corporation's opinion, render the premises fit. The defendant corporation, however, refused even to consider an application for postponement, taking the view that it was useless to hear the plaintiff as no repairs could make the premises fit. It was held that the corporation was wrong in so doing, because it was bound in exercising its powers under the Act to behave judicially and hear the plaintiff before reaching a decision (r). Again the same principle has been applied to the statutory appeal to the High Court against a clearance or compulsory purchase order under the Housing Act, 1936 (s). It has been held in such proceedings that the inspector, before whom the local inquiry is held, and the Minister, in confirming the order after such inquiry, act quasi-judicially and must not, for instance, receive evidence from

(p) (1863) 14 C.B. N.S., 180; 26 Digest 518, 2202.

(q) [1917] 2 Ch. 31; 28 Digest 466, 775.

(r) The local authority in issuing an order requiring the execution of repairs is not acting judicially and so need not give the owner a hearing. The most that can be required is that the committee dealing with the matter shall give proper consideration to the material before it: *Cohen v. West Ham Corporation* [1933] Ch. 814; Digest Supp.

(s) 2nd Schd.

one side only to which the other party has no opportunity of replying (*t*).

(c) *Bona fides*.—Thirdly, the decision, to be consonant with natural justice, must be honestly and *bona fide* arrived at (*u*). Powers of a judicial nature may not be validly exercised for a corrupt or improper purpose, nor may they be used colourably, ostensibly for their proper purpose but in reality as a means of achieving some end for which they were never designed. In other words, English law, though it has no specific name for this principle, recognises as a ground of invalidity what in French administrative law is aptly called “*détournement de pouvoir*.” This principle may be illustrated by the exercise of a power of compulsory purchase of land. In *Municipal Council of Sydney v. Campbell* (*v*), the council had statutory power to acquire land compulsorily for “carrying out improvements in or remodelling any portion of the city.” An order for compulsory purchase in proper form was obtained, ostensibly for this purpose, but in reality that the increase in value of the area in question, anticipated as a result of a street extension, might be obtained by the local authority which had borne the expense of making the new street. An injunction to restrain the enforcement of the order was granted and affirmed by the Judicial Committee of the Privy Council. In the judgment the principle was clearly stated to be that

(*t*) *Frost v. Minister of Health* [1935] 1 K.B. 286; Digest Supp.; *Errington v. Minister of Health* [1935] 1 K.B. 249; Digest Supp. Moreover where the Minister or his inspector is required to act quasi-judicially and fail to do so, the Minister's action in confirming the order is not “within the powers of the Act”; see above, p. 334. But the local authority, in originally making the order, is not acting judicially and need not give the owner a hearing: *Fredman v. Minister of Health* (1935) 154 L.T. 240; Digest Supp.; though there are *dicta* that it must have some material before it justifying its action: *Re Bowman* [1932] 2 K.B. 621; Digest Supp.; *Re Falmouth Clearance Order, 1936* [1937] 3 All E.R. 308; 157 L.T. 140; Digest Supp. This seems, however, to relate really to the question of *bona fides*.

(*u*) See *Maclean v. The Workers' Union* [1929] 1 Ch. 602, pp. 624–627; 43 Digest 101, 1046.

(*v*) [1925] A.C. 338, p. 343; Digest Supp.

“ A body such as the Municipal Council of Sydney, authorised to take land compulsorily for specific purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Courts will interfere.”

Nor does the principle require that a corrupt motive shall have been present : it is sufficient that a power conferred for one purpose shall have been exercised under the influence of a desire to effect a result other than that contemplated by the statute conferring the power. Thus where a local Act required any person, wishing to make a communication for vehicles across a footpath from the street, to submit plans to the local authority and to obtain its approval before executing the work, it was held that this section did not override the private right of an adjoining owner to have access to the highway and that in consequence the local authority was only entitled, in considering whether to approve the plans, to take into account the sufficiency of the communication in preventing injury to the surface of the footpath. It was not, however, entitled to give consideration either to the use to which the property was put, the inconvenience or danger to the public using the highway, or to powers which it hoped to obtain under a proposed town planning scheme (*w*).

Limits of Judicial Control.—These two principles, that judicial powers must be exercised *intra vires* and in accordance with the rules of natural justice, are, however, the limits beyond which the supervision of the ordinary law courts cannot go. The courts may hold that the purported exercise of such powers is invalid, because either of the principles has been infringed, but there they must stop, and if both principles have been strictly complied with they must accept and uphold the decision arrived at. These limits are more clearly to be recognised if we consider for a moment what the courts cannot do in exercising control over “judicial” functions exercised

(*w*) *Marshall v. Blackpool Corporation* [1935] A.C. 16; Digest Supp. See now, however, the Restriction of Ribbon Development Act, 1935.

by bodies which are not themselves courts of law in the strict sense.

First, bodies which are not strictly courts of law, but nevertheless exercise "judicial" powers, need not in so doing follow the procedure of ordinary courts. Thus in the case of those bodies even the first rule of natural justice receives a looser interpretation than in its application to courts in the strict sense. Statute or the rules under which the body exercises its judicial powers may properly confer upon an apparently interested party the duty of deciding (*x*), and provided it acts honestly, its decision is unimpeachable. Again, the mere fact that the deciding body appears to act both as prosecutor and judge is not in itself sufficient evidence of such bias as will invalidate the decision, for the truth can often only be discovered by following such a practice (*y*). But anything overstepping these bounds can be dealt with by the courts, which, though they must recognise as inevitable the defects inherent in administrative machinery, are not thereby debarred from insisting that irregularities, carrying the appearance of unfairness, shall be avoided. Thus if a motion before a local authority is one which must be dealt with in a "judicial" manner, the fact that a member, who votes, has such a real interest in the subject-matter as may be assumed to have biased his judgment, is sufficient to prevent the resolution from standing (*z*).

Moreover, unlike ordinary law courts, these bodies need not hold public hearings. A party must be given an adequate

(*x*) But the courts will struggle against having to put such an interpretation on an enactment: *Wingrove v. Morgan* [1934] Ch. 423; Digest Supp.

(*y*) *Maclean v. The Workers' Union* [1929] 1 Ch. 602, p. 626; 43 Digest 101, 1046.

(*z*) *R. v. Hendon Rural District Council. Ex parte Chorley* [1933] 2 K.B. 696; Digest Supp. (where a member of a council interested in the use of certain property voted on a resolution to permit its use under an interim development order); the provisions of the Local Government Act, 1933, §§ 76 and 95, relating to the disability of members of councils and committees on the ground of interest, may be assumed to strengthen the law in this matter. *Davis v. Bromley Corporation* [1908] 1 K.B. 170; 38 Digest 192, 303 (where enmity was alleged); *R. v. North-East Surrey Assessment Committee* [1933] 1 K.B. 776; Digest Supp. (where an assessment committee came to a decision without excluding the county valuation officer).

opportunity of stating his case, but this need not necessarily involve an oral hearing (a) : he cannot claim to be brought face to face with his judges. Lastly, a party to such proceedings cannot insist upon reasons being given for the decision, and consequently he cannot limit the deciding body to the consideration of the facts put before it in evidence : it may become acquainted with other facts which influence it. All that can be required of it in such circumstances is that it shall act honestly, consider fairly the party's case, give him an opportunity to answer such facts (b), and not allow irrelevant matters to influence its decision in such a way as to make that decision a colourable or dishonest exercise of the power of deciding.

Again, however, statute may impose duties which prevent a pedantic adherence to the requirement of avoiding even the appearance of injustice. It has been said that

“ where public departments are given . . . quasi-judicial duties as well as administrative duties, the need of their carrying out their quasi-judicial duties in strict accordance with natural justice must always be considered in the light of their administrative duties also ” (c).

Departments have many duties of supervision and advice over local authorities, and if, either prior to the submission to them for decision of some matter requiring them to act judicially or even while the decision is being considered by them, they were debarred from all contact with the local authorities concerned, administration would break down. Thus in connection with the powers of the Minister of Health to confirm clearance or compulsory purchase orders under the Housing Act, 1936, it has been held that there is nothing to

(a) *Stuart v. Haughley Parochial Church Council* [1936] Ch. 32 ; Digest Supp.

(b) *R. v. Milk Marketing Board. Ex parte North* (1934) 50 T.L.R. 559 ; Digest Supp. ; *Errington v. Minister of Health* [1935] 1 K.B. 249 ; Digest Supp. (where additional evidence was furnished by one party after the hearing). But consideration of plans produced by one party at the local inquiry though commented on by neither side, is not improper, since each side had an opportunity to deal with them : *Re Brighton Corporation Order, 1937* [1938] 2 All E.R. 146 ; 158 L.T. 496 ; Digest Supp.

(c) *Per Scott L.J. in Horn v. Minister of Health* [1937] 1 K.B. 164, p. 186 ; [1936] 2 All E.R. 1299 ; Digest Supp.

invalidate his confirmation in the fact that his officers, before any steps were taken by the local authority, have advised on the properties to be so dealt with (*d*), or, before any objections were made to the order, have advised on its form (*e*), or, even while its confirmation is under consideration by the Minister, have received a deputation from the local authority to discuss other housing matters (*f*).

With these limitations upon their supervision, the ordinary law courts, it is evident, do not profess to act as courts of appeal from "judicial" bodies. The courts cannot review the evidence and see whether a right decision has been arrived at. Nor does the fact that a question of pure law arises for determination serve to extend the jurisdiction of the ordinary courts or to oust the jurisdiction of the administrative body (*g*). Their functions are solely to see that jurisdiction has not been exceeded, either in the narrow sense as being *ultra vires*, or in the broader sense including the rules of natural justice (*h*). If there is an excess of jurisdiction, they can prohibit further hearing, or quash a decision already come to, but that is all: they cannot even, except by their refusal to interfere, confirm a decision. This is particularly the case in connection with the many powers of a "judicial" nature conferred by statute upon Ministers or Central Departments, which we have recently considered, for the terms in which these powers are conferred are frequently so wide—authorising decisions as the Minister thinks "equitable" or "proper"—that all idea of appeal on the merits is obviously excluded.

(*d*) *Offer v. Minister of Health* [1936] 1 K.B. 40; Digest Supp.

(*e*) *Frost v. Minister of Health* [1935] 1 K.B. 286; Digest Supp.

(*f*) *Horn v. Minister of Health* [1937] 1 K.B. 164; [1936] 2 All E.R. 1299; Digest Supp.; *Aliter*, if the deputation discusses the order under consideration: *Errington v. Minister of Health* [1935] 1 K.B. 249; Digest Supp.

(*g*) *Peebles v. Oswaldtwistle Urban District Council* [1896] 2 Q.B. 159, affirmed *sub nom.* *Pasmore v. Oswaldtwistle Urban District Council* [1898] A.C. 38; 23 Digest 298, 3636; *Board of Education v. Rice* [1911] A.C. 179, p. 182; 19 Digest 602, 290; *R. v. Minister of Health. Ex parte Committee of Visitors of the Glamorgan County Mental Hospital* [1938] 1 All E.R. 344; 36 L.G.R. 164; Digest Supp.

(*h*) *Leeson v. General Medical Council* (1889) 43 Ch.D. 366; 34 Digest 544, 30.

Illustrations : (i) *R. v. Local Government Board*.—

The application of the principles, upon which supervision by the courts of "judicial" functions is exercised, to the judicial and quasi-judicial powers of Ministers or Departments may best be illustrated by a series of important cases. In *R. v. Local Government Board* (i) a local board (the predecessor of the modern urban district council) acting under § 150 of the Public Health Act, 1875, gave notice to T., an owner of a house, to pave and make up the road in front of it. On his default the local board followed the course prescribed by the section, and itself did the work, apportioned the expense among the frontagers affected and gave notice of his apportionment to T. T. thereupon took advantage of § 268 of the Act, permitting an aggrieved person to address a memorial, stating the grounds of his complaint, to the Local Government Board, which was empowered to make such order as might seem to be equitable. In turn the local board sought a prohibition against the Local Government Board on the ground that as a matter of law T.'s appeal could only relate to the mode of payment, and not to the necessity of undertaking the work, which latter fact was what the Local Government Board was also proposing to consider. The Court of Appeal refused to permit the issue of a prohibition. Brett L.J. (j) said :

"Whether the decision of the Local Government Board is to be considered as judicial, I do not know that it is necessary to determine in the present case. I have a very strong opinion that it is, and that when this memorial is presented it is the duty of the Local Government Board to hear the parties who present that memorial. It is obvious that they are bound to hear the particular local board, if the person deeming himself aggrieved is bound to transmit to the local board the memorial. Now whether they are bound to hear the parties orally, I do not undertake to say. That procedure is not marked out by this Act. I should doubt that they are bound to hear them orally, but that they are bound to let the party who presented the memorial know what is the answer of the particular sanitary board against which he has

(i) (1882) 10 Q.B.D. 309; 26 Digest 532, 2318.

(j) P. 321.

complained and to give him an opportunity of answering their answer to him, is, to my mind, obvious."

Again (*k*):

"It seems to me obvious from the construction of the Act that the Local Government Board have power to inquire into every circumstance, however remote, which could reasonably determine the question, whether it was inequitable or not that a particular sum should be paid. If that be so, they do not inquire into former matters as decisions of the local authority, but they inquire into them as facts in order to enable them to determine upon the largest interpretation of the word "equitable" that can be given to it (*l*), whether the particular sum is one which is equitable, fair, and right that the individual should be forced by the legislature to pay for works which have been done against his will; and therefore I should be loth to the extremest degree to fetter the power of the Local Government Board to inquire into every fact, which could reasonably lead them to a fair and equitable conclusion with regard to that question which is the question before them."

(*ii*) **Board of Education v. Rice.**—In *Board of Education v. Rice* (*m*), the question before the House of Lords related to the duties of the Board of Education in determining, under § 7 of the Education Act, 1902 (*n*), a dispute between the managers of a non-provided school and a local education authority as to whether the latter had maintained and kept the school efficient. Lord Loreburn L.C. said (*o*):

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes

(*k*) Pp. 325-326.

(*l*) It has been said that on an appeal under § 268 of the Public Health Act, 1875, the Local Government Board "is not a Court. No procedure is pointed out and the idea is that the Board are to pronounce what judgment they choose though opposed to law and principles of equity, so long as they think it equity." *Per* Matthew J. in *Eccles v. Wirral Rural Sanitary Authority* (1886) 17 Q.B.D. 107, p. 112; 38 Digest 155, 47.

(*m*) [1911] A.C. 179; 19 Digest 602, 290.

(*n*) Repealed and replaced by Education Act, 1921, § 29, and subsequently repealed by Education Act, 1944.

(*o*) P. 182.

for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind ; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the Board under s. 7, sub-s. (3) of this Act. The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority. The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by *mandamus* and *certiorari*."

On the facts it was held that the Board had not discharged its duty, and its purported determination was quashed by *certiorari* and a *mandamus* issued ordering it to give a proper determination.

(iii) **Local Government Board v. Arlidge.**—Lastly we must consider the case of *Local Government Board v. Arlidge* (p). Section 17 of the Housing, Town Planning etc. Act, 1909 (q), gave power to local authorities to make closing orders in respect of dwellinghouses which appeared to them to be unfit for human habitation, and provided that they might determine such orders when satisfied that the premises had been so

(p) [1915] A.C. 120; 38 Digest 217, 518.

(q) Now repealed, see below, p. 472.

rendered fit. The section also gave the owner affected a right of appeal to the Local Government Board. Arlidge was the owner of a house in respect of which a closing order had been made, and on the refusal of the local authority to determine the order he appealed to the Local Government Board. The Board sent down an Inspector who held a local inquiry, at which Arlidge attended with his solicitor and witnesses, and evidence was given and his case was argued. The Inspector submitted his report to the Board, which gave Arlidge a further opportunity, of which he did not avail himself, to submit any additional statement in writing which he might wish to make. The Board then made an order in proper form dismissing the appeal.

Arlidge thereupon applied to the courts for *certiorari* to quash the Board's order, on the ground that the appeal had not been determined in the manner provided by law, and, in particular, that (1) the appeal had not been determined by the Local Government Board itself, but by some unknown civil servant in the Department, and that Arlidge was entitled to know who actually decided it, (2) the rules of natural justice had been infringed in that Arlidge had been given no opportunity to appear and argue his case orally before the person actually deciding the appeal (*r*), (3) Arlidge was entitled to see the report of the local inquiry made by the Inspector to the Board, but that access to this document had been refused him (*s*). The House of Lords, however, refused the issue of *certiorari*, holding that, though the Local Government Board in hearing an appeal must act judicially, since its decision affected the rights and property of individuals and might impose obligations upon them, and must in consequence

(*r*) Cf. *Re Sir J. W. B. Simeon, Bt.* [1935] 2 K.B. 183; Digest Supp. where it was held that there was no right to attend at the Ministry to argue a point of law raised but not decided at the preceding local inquiry.

(*s*) Cf. *William Denby & Sons, Ltd. v. Minister of Health* [1936] 1 K.B. 337; Digest Supp., where it was held that a change of wording in the Act, requiring the Minister to "cause" a local inquiry to be held instead of holding one himself, did not confer a right to see the inspector's report. See, however, Restriction of Ribbon Development Act, 1935, § 7, and Housing Act, 1936, § 41, which require the Minister to give reasons.

observe the rules of natural justice, it need not, to fulfil these requirements, follow the procedure of a court of law. Viscount Haldane L.C. (t) said :

“ When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal.”

After pointing out that the Local Government Board was not organised as a court of law, but as an administrative Department, he proceeded,

“ When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently.”

Similarly Lord Shaw (u) observed :

“ When a central administrative board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated ; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are *ex necessitate* those of courts of justice is wholly unfounded.”

Statutory Exclusion of Judicial Control.—Just as in the case of the very similar class of powers of delegated legislation (*v*) conferred upon Ministers or Departments, so here clauses are sometimes inserted in statutes to exclude judicial control. It is settled law that where an order of *certiorari* could be made at common law it can only be taken away by express negative words, though where the right to an order of *certiorari* is itself the creature of statute a clause making the decision final is sufficient to exclude the writ (*w*). Many administrative decisions are in this way excluded from the scope of this remedy. One illustration will suffice. The Local Government Act, 1933, permits a person aggrieved by a compulsory purchase order to apply to the High Court to have it quashed on certain grounds and within a certain period after it becomes operative (*x*). But the section proceeds :

“ Subject to the provisions of the last preceding subsection a compulsory purchase order shall not, either before or after its confirmation, be questioned by prohibition or *certiorari* or in any legal proceedings ” (*y*).

Again, the powers conferred may be so wide in their terms that, though the remedy by an order of *certiorari* may in theory not be taken away, yet in practice it is valueless (*z*). The most far-reaching form of power was perhaps contained in the Local Government Act, 1894 (*a*). Under that section a parish council might obtain an order from the county council enabling it to purchase land compulsorily. The order required the confirmation of the Minister of Health, but the Act provided that :

“ upon such confirmation the order . . . shall become final and have the effect of an Act of Parliament, and the confirmation of

(*v*) Many of which are “ judicial ” for the purposes of control by the courts.

(*w*) *R. v. Hunt* (1856) 6 E. & B. 408 ; 16 Digest 437, 3022.

(*x*) § 162 ; see above, p. 234.

(*y*) See *R. v. Minister of Health. Ex parte Hack* [1937] 3 All E.R. 176 ; 157 L.T. 118 ; Digest Supp.

(*z*) See *R. v. Minister of Health. Ex parte Wortley Rural District Council* [1927] 2 K.B. 229 ; 38 Digest 579, 1146.

(*a*) § 9, now repealed and replaced by the Local Government Act, 1933, § 168.

the [Minister] shall be conclusive evidence that the requirements of this Act have been complied with and that the order has been duly made and is within the powers of this Act.”

Administrative Law and the Rule of Law.—In the light of these developments and of the limitations inherent in judicial control it must frankly be admitted that at the present day the principle of the Rule of Law, if understood in the sense that all exercise of power is subject to the control of the ordinary courts, is, at the least, subject to exceptions. The ordinary Law Courts can no longer review the exercise of all forms of public authority, for they are prevented from doing so in many cases by express statutory provisions. Within the limits of these excluded matters law certainly still exists, for the very exclusion is effected by statute, but this law is not administered by the ordinary courts; on the contrary its execution is left to the unfettered discretion of administrative officers or bodies.

This development has led in recent years to an outcry that the Rule of Law is being destroyed and that, so far from being replaced by a system of administrative law comparable to that known on the Continent, we are becoming subject to the disadvantages of that system, in the immunity of official actions from review in the ordinary courts, without its compensating advantages derived from a control exercised by strong administrative tribunals. In short, it is said that the Rule of Law is being replaced by an uncontrolled administrative lawlessness (*b*). These complaints led to the appointment by the Lord Chancellor of a Committee to inquire into the extent to which powers of a legislative and judicial nature possessed by the Executive infringe the Rule of Law and to suggest safeguards. The Report of this Committee (*c*) has already been mentioned. Recommendations were made in it for limiting the cases in which truly autonomous powers of

(*b*) See C. K. Allen, *Law in the Making*, Ch. VII; *Bureaucracy Triumphant*. W. A. Robson, *Justice and Administrative Law*. F. J. Port, *Administrative Law*. Lord Hewart, *The New Despotism*.

(*c*) *Report of Committee on Ministers' Powers*, Cmd. 4060/1932.

legislation are granted and for ensuring as far as possible some control by the courts over their exercise. So far as judicial or quasi-judicial powers are concerned the Committee expressed the view that whenever possible a right of appeal on questions of law, but not of fact, should be given to the law courts, and that the procedure then available in the form of the prerogative writs should be modernised (*d*). Beyond these somewhat narrow suggestions, designed rather to take away the appearance of arbitrariness than to alter the system itself, the Committee, which, it may be perhaps suggested, was appointed to curse, has, like Balaam, stayed to bless.

The fact is that in the modern State, which either directly or through its local authorities undertakes the provision of so many services rendered necessary by the growth of a large urban population, a new philosophy of law is essential. The eighteenth century, and indeed the nineteenth century, regarded a rigid individualism as the basis upon which law should rest. Such a principle was no doubt suited to a predominantly agricultural, or even perhaps to an expanding industrial community, but it led to the recognition of the Rule of Law in such a form that the rights it maintained were confined to those of private individuals. Rights, moreover, under such a principle are absolute—an act is either lawful or unlawful, and there is no intermediate position in which, though lawful, an act may be prohibited in the public interest. The only modification—if modification it can really be called—is that contained in the maxim *sic utere tuo ut alienum non laedas*, and there the *alienus* is a private individual, your neighbour as a specific person possessed of private rights which must not be infringed.

Recasting of the Rule of Law.—Nowadays the time is ripe for the birth of a new legal philosophy, which will recognise that the community as a whole has interests (*e*) and

(*d*) This last recommendation has been adopted in the Administration of Justice (Miscellaneous Provisions) Act, 1938.

(*e*) Or, indeed, classes of persons within the community: e.g. see Trade Disputes Act, 1906; Agricultural Holdings Act, 1923; Workmen's Compensation Act, 1925.

therefore must have rights, and that these latter will prevail in any conflict with private rights. Private rights will reside on a different and lower plane, and as against the rights of the community will only appear as relative. Though not yet recognised as a legal theory, in practice the protection of the interests of the community, even to the extent of overruling private rights, has had to be provided for by statute as a necessity, for an individualistic system of law has failed in meeting many of the problems of urbanisation. Progressively, therefore, private rights have been superseded by what are in effect public ones. Thus matters such as adequate drainage, the prevention of noxious trades, the proper observance of building lines and the orderly regulation of building development—the regulation of which the early nineteenth century was content to leave to the private landlord—have under the names of public health and town and country planning become duties to be performed by local authorities (f). This change at once leads to stress in the legal machine, because the newer principle of public rights is incompatible with the law which, still influenced by individualism, can only take account of absolute private rights. To evade this state of strain, therefore, powers, of the kinds of which complaint is made, have had to be granted to administrative Departments.

The recognition on the one hand of paramount public rights, and on the other hand of only relative private rights, will of necessity involve a reframing of the Rule of Law in a way which, while maintaining the supremacy of the law of the land, will yet involve giving to the phrase a set of meanings different from those enunciated by Dicey. The individual freedom which the Rule of Law is designed to protect can be threatened in subtler ways than by the deprivation of property or by restrictions upon its use. The liberty of the subject is dependent upon the continued existence of the State, which may easily be menaced by widespread disease, or poverty, or

(f) Nor is this process of superseding private rights by public law by any means complete; the claims of the community are rapidly growing in number and extent.

ignorance, and to combat these evils some limitations on the rights of property as formerly understood may prove the surest way of preserving the largest measure of freedom.

The Separation of Powers.—The increase in State activity in another way involves of necessity the performance of legislative and judicial functions by administrative officers. As Maitland said as long ago as 1885 (g) :

“it is easy to suggest that at least a distinction between judicial and administrative functions is possible, and between extreme cases the distinction is obvious enough. But often the line of demarcation is uncertain or obscure.”

We may go further and apply the same words to the distinction between legislative and administrative, and, indeed, between legislative and judicial action. The making of rules, regulations and orders, the confirmation of schemes, the giving of assent or approval—especially after the holding of a local inquiry—to proposals or orders, and the hearing of appeals are all functions which are to be found exercisable by the Minister of Health ; and yet they swing through the whole range of powers from purely legislative to purely judicial, their one common factor being that they have all to do with administration. The performance of any act must involve a decision : but when is that decision to be called administrative and when judicial ? Again, the performance of an administrative act may well involve a process which is hard to distinguish from legislation (h). *

(g) *Justice and Police*, p. 85.

(h) The lines between legislative, administrative, and judicial action are almost impossible to draw. All three forms of activity must at some stage involve a decision, and a command or order to some person or persons. Legislation is pre-eminently the creation of rules of conduct and is distinguished by the generality of the commands it issues, though whether this generality is to be sought in the fact that it applies generally to persons of a given class, as Blackstone thought, or to acts or forbearances of a class, as was maintained by Austin, may still be open to discussion. Administration signifies the carrying out of the law. The element of decision appears more strongly than in legislation, but it is essentially a process akin to legislation, since, within the limits prescribed for it by the law, the decision is arrived at by the consideration only of policy or expediency. The element of command it contains is distinguishable from legislation by reason

In fact the impossibility of drawing hard and fast lines, logically dividing into separate compartments the spheres of legislation, administration and the judicial settlement of disputes, has not prevented all these forms of governmental activity from being carried on, nor has it stopped Parliament from creating the powers which convenience or necessity dictates. Previously a sufficiently accurate distinction could be drawn from a consideration of the organs exercising the powers in question. Legislation was the work of Parliament, administration of the Executive and the judicial settlement of disputes of the law courts. Now, however, Parliament, by conferring legislative and judicial powers upon administrative bodies, has made a reconsideration of the whole question essential. When this is undertaken we find Parliament exercising certainly administrative, if not also judicial functions, and the law courts performing some varieties of administrative work. In any case the powers which have been growing up piecemeal really reveal that there is a large sphere of administration which overlaps parts of the work of legislation and adjudication. Hence an Administrative Law, dealing with these powers and indeed with all forms of administration, whether undertaken by the State itself or by local authorities, inevitably tends to grow as a branch of our jurisprudence distinct from the ordinary private law in its principles and perhaps even in the tribunals administering it.

The Housing Acts.—A model history in miniature of this development of Administrative Law is afforded by the provisions of the Housing Acts. These Acts have contained provisions enabling local authorities to secure the closing of

of its lack of generality. In judicial action, the element of decision is pre-eminent, since it is confined to the settlement of disputes, which have arisen, by the application of fixed rules of law. For more detailed discussion of the matter see F. J. Port, *Administrative Law*, Ch. 3; W. A. Robson, *Justice and Administrative Law*; D. M. Gordon, "Administrative Tribunals and the Law Courts," *Law Quarterly Review*, vol. xlix (1933), pp. 94 and 419. W. I. Jennings, *The Law and the Constitution*, Ch. I. Cf. *Shell Co. of Australia, Ltd. v. Federal Commissioner of Taxation* [1931] A.C. 275; Digest Supp.; *Toronto Corporation v. York Corporation* [1938] A.C. 415; [1938] 1 All E.R. 601; Digest Supp.

dwellinghouses unfit for human habitation and the demolition of houses left unrepaired. The first Act, the Housing of the Working Classes Act, 1890, conferred on local authorities the power to take summary proceedings before the justices to obtain closing orders, and provided an appeal for the property owner to quarter sessions. The Housing of the Working Classes Act, 1903, though it gave somewhat more extensive powers, still adhered to the principle that the local authority must apply to the courts for the making of orders. A big step, however, was taken by the next Act, the Housing, Town Planning etc. Act, 1909 : under it the orders were made by the local authority itself and appeal lay to the Local Government Board. The Housing Act, 1925, reproduced the provisions of the 1909 Act : the whole process had been withdrawn from the judiciary and confided to the Executive. The provisions of this Act of 1925 are interesting. They provided that a local authority might (i) make an order for the owner of a dwellinghouse to execute specified work necessary to make it reasonably fit for habitation, and that on default the authority might itself do the work and recover the cost from the owner (i); (ii) make a closing order in respect of a house unfit for habitation, which remained effective until the house was rendered fit; and (iii) make a demolition order where a closing order remained in force for three months (j). In each case the aggrieved owner might appeal within specified periods to the Minister of Health. The Minister might make rules for determining the procedure to be followed on such appeals, but the rules were required to provide for the holding of a local inquiry. At any stage the Minister, if so directed by the High Court, was bound to state a special case upon any question of law. The decision of the Minister was to be made in the form of an order as he should think equitable, and it was to be binding and conclusive on all parties (k).

The Housing Act of 1930 repealed these provisions and,

(i) Housing Act, 1925, §§ 3 and 7.

(j) *Ibid.*, § 14.

(k) *Ibid.*, § 115. The effect of identical provisions was considered in *Local Government Board v. Arlidge* [1915] A.C. 120; 38 Digest 217, 518; above, p. 425.

largely as a result of the agitation against "bureaucracy," effected a compromise between the principles upon which the earlier and the later Acts were based. It retained the provisions enabling the local authority itself to make closing and other orders without the necessity of an application to the courts. So far administration triumphed. But a person aggrieved by an order was no longer to appeal to the Minister ; in place of administrative justice the courts were preferred. An appeal under the Act of 1930 lay to the County Court with a further and final appeal upon a point of law only to the Court of Appeal (1).

Scope of Judicial Control.—Some would have us believe that this is a re-entry of the Rule of Law into a branch of administration from which it had gradually been excluded. It is certainly akin to the course approved by the recommendations of the Committee on Ministers' Powers, and perhaps this compromise will eventually be generally adopted. But it may be questioned whether this solution is even a desirable one. It is obviously imbued with the idea that all questions of fact as well as questions of law ought to be open to review. Yet in practice this idea does not work well. The facts are often technical in the extreme and a county court judge may prove an unsatisfactory tribunal for determining them. Nor, though it may sound to be a paradox, is a judge necessarily a satisfactory tribunal for the determination of questions which, if left to him, become questions of law. Modern local government legislation is continually having to create new terms of art, which may be difficult to define in words but which are easily capable of recognition when they are met with in fact. A simple illustration may be taken in the phrase "unfit for human habitation" as applied to dwellinghouses by § 25 of the Housing Act, 1936. A judge may be a worse tribunal than a sanitary inspector for deciding both the question of law as to the meaning of this phrase and the question of fact as to whether

(1) Housing Act, 1930, § 22 ; now Housing Act, 1936, § 15.

particular dwellinghouses fall within its terms (*m*). The true scope of judicial control, within which it is both satisfactory and desirable, is the enforcement of duties and the prevention of the excess or abuse of powers. Within these limits it is a necessity in a free community : beyond them it may hamper administration without advancing the public interest.

Finally, it should be noticed that the use of administrative justice has in the past been furthered by the inevitable rigidity of judicial control, and by the expense and delay attendant on applications to the courts. The latter may be cured ; but the former will remain, and as soon as agitation has died down, unless the true limits of judicial control are recognised, it may lead once more to the expansion of Administrative Law.

(*m*) Cf. *Estate and Trust Agencies (1927), Ltd. v. Singapore Improvement Trust* [1937] A.C. 898 ; [1937] 3 All E.R. 324 ; Digest Supp., and the comments thereon in *Re Falmouth Clearance Order, 1936* [1937] 3 All E.R. 308 ; (1937) 157 L.T. 140 ; Digest Supp.

CHAPTER XIX

LOCAL AUTHORITIES IN LITIGATION

Section I.—THE TORTIOUS LIABILITY OF LOCAL AUTHORITIES

Local Authorities liable in tort.—Already we have seen (a) that, although the Crown is immune from liability in tort, local authorities cannot plead the fact that they have public duties to perform as a defence to such actions. Like trading corporations their funds are liable to pay damages, and they may be restrained by injunction (b). In general it is sufficient to note this principle, that local authorities are liable in tort, and that, therefore, the ordinary law of torts is applicable to them ; but their nature as bodies corporate, having powers and duties cast upon them by statute, does cause certain modifications in the application of the ordinary law of torts to them.

Vicarious Liability.—First, local authorities are corporations, and therefore can only act through the agency of others. The general rule of law imposes liability upon a master for the torts committed by his servant acting in the course of his employment. This principle was clearly applicable to individuals, but once it was far from clear to what extent it applied to corporations, including local authorities. For some time it was doubted whether a corporation could ever be liable

(a) Above, Ch. XVI.

(b) *Mersey Docks & Harbour Board Trustees v. Gibbs* (1866) L.R. 1 H.L. 93 ; 13 Digest 349, 880. It is, of course, the funds of the authority as a body corporate that are liable ; the individual members, except in so far as they can be shown personally to have committed torts, are not individually liable. Some degree of immunity is, however, granted by statute : see below, pp. 455-461.

since the commission of a tort must necessarily be an *ultra vires* act ; but gradually the requirements of convenience triumphed. It was pointed out that a corporation can only act through its agents, and therefore it can only be liable in tort for the wrongful acts of its servants. Further, the true basis of the vicarious liability of a master for his servant's torts is not any wrongdoing or wrongful command of the master, but is simply founded upon the principle of public policy requiring the master, who obtains the benefit of the servant's work, to hold the rest of the world harmless from his activities (c). Hence no logical difficulty need prevent a statutory corporation from being liable to compensate persons injured by its servants while acting in the course of their employment, even in cases where the tort committed requires as one of its elements the presence of malice (d). Indeed, so far have the requirements of convenience been pushed, that it has even been held that a statutory corporation may be made liable in damages for the torts committed by its servants when engaged in an undertaking which is *ultra vires* the corporation (e), a decision which does involve considerable difficulty.

Relation of Master and Servant.—But what circumstances give rise to the relation of master and servant for this purpose ? Again the principle is uniform : if the defendant had the legal power to control the mode in which the services were performed by the actual tortfeasor, then the relation exists and the defendant is liable if the tort was committed in the course of employment. For instance a local authority undertaking the running of motor omnibuses has this legal power of controlling the mode in which its drivers perform their work, and is therefore liable for injuries caused by the negligent driving of one of its omnibuses. On the other hand, a physician, appointed by a local authority maintaining a hospital, is not the servant of

(c) *Houldsworth v. City of Glasgow Bank* (1880) 5 App. Cas. 317, p. 326 ; 13 Digest 405, 1268.

(d) *Citizens' Life Assurance Co. v. Brown* [1904] A.C. 423 ; 13 Digest 404, 1256.

(e) *Campbell v. Paddington Corporation* [1911] 1 K B. 869 ; 26 Digest 429, 1483.

the local authority, for the physician is obviously employed as a professional expert to exercise his own skill and judgment in the treatment of patients, and is not bound to obey any directions which the local authority might choose to give him as to the manner in which he should treat a particular patient (*f*). But this principle must not be pushed too far. For instance, though a hospital authority may be exempt from liability for the negligence of its professional staff in treating patients, it yet remains itself under a duty to see that the premises are safe for their reception. A failure to perform this duty, even though resulting from an omission of the professional staff to take proper precautions, will render the authority liable (*g*).

These are, however, ordinary principles, but difficulties may arise in applying them to certain classes of officers. Local authorities are in many cases required or empowered by statute to appoint officers, over whom they may by law have little control or over whom Central Departments may exercise powers of direction. In such cases it may be hard to decide whether the appointing local authority is liable as a master for the officers' torts. The principle to apply in order to test the liability of the local authority is thus enunciated by Wills J. in *Stanbury v. Exeter Corporation* (*h*) :

“ If the duties to be performed by the officers appointed are of a public nature and have no peculiar local characteristics, then they are really a branch of the public administration for purposes of general utility and security which affect the whole kingdom ; and if that be the nature of the duties to be performed, it does not seem unreasonable that the corporation who appoint the officer should not be responsible for acts of negligence or misfeasance on his part.”

In other words, if the officer is merely a delegate appointed to perform duties imposed by law upon the local authority, then the latter is liable : while, if after appointment he has inde-

(*f*) *Evans v. Liverpool Corporation* [1906] 1 K.B. 160 ; 34 Digest 40, 160.

(*g*) *Lindsey County Council v. Marshall* [1937] A.C. 97 ; [1936] 2 All E.R. 1076 ; Digest Supp. And even in the case of a physician (if he is a whole-time officer) there is some question whether a local authority might not be liable for his negligence : see *Gold v. Essex County Council* [1942] 2 K.B. 293 ; [1942] 2 All E.R. 237.

(*h*) [1905] 2 K.B. 838, p. 843 ; 34 Digest 39, 156.

pendent public duties cast directly upon himself by the law, then the local authority appointing him is not liable for torts committed by him in carrying out these duties. Thus it has been held that a police constable, though appointed by the watch committee of a borough, is not the servant of the municipal corporation so as to involve it in liability for an unlawful arrest made by him (*i*). Similarly poor law officers appointed by a local authority are not the servants of that authority, at any rate as against a pauper injured by them, for the central administrative control exercised over the poor law is so great that the appointing local authority and the officers are in effect both employed merely to perform ministerial duties as agents of the Minister of Health (*j*). On the other hand, a teacher appointed by a local education authority is a servant so as to impose liability on the authority for injuries negligently caused to a child (*k*).

Statutory Powers and Duties.—When we have determined whether the relation of master and servant exists between a local authority and an officer or workman appointed by it, a second question arises. To what extent does the fact that statute imposes powers and duties upon local authorities serve to modify the application of the general law of torts to them, or, in other words, what acts involve them in tortious liability? Statute is legally omnipotent to change the law, and the fact that local authorities act under statutory powers and have statutory duties to perform may, therefore, alter the application of the ordinary law of torts, either by relieving them from liability in circumstances where liability would normally arise, or by imposing a tortious liability in cases in which the ordinary individual would be immune. Put more specifically, the fact that a local authority is acting under statutory powers or in performance of statutory duties may

(*i*) *Fisher v. Oldham Corporation* [1930] 2 K.B. 364; Digest Supp. Cf. *Lewis v. Cattile* [1938] 2 K.B. 454; [1938] 2 All E.R. 368; Digest Supp., holding that a constable is a person "holding office under His Majesty" within the Official Secrets Act.

(*j*) *Tozeland v. West Ham Union* [1907] 1 K.B. 920; 34 Digest 220, 1823.

(*k*) *Smith v. Martin and Kingston-upon-Hull Corporation* [1911] 2 K.B. 775; 34 Digest 40, 163.

prevent its acts from being tortious, and conversely a failure to perform its statutory duties may give a cause of action to a person injured thereby. Each of these problems must be considered separately.

Obviously if a local authority merely fulfils a positive duty imposed upon it by statute, no liability can fall upon it even though its acts interfere with private rights, for the statute by imposing the duty must be taken as *pro tanto* abolishing those previously existing private rights. The same result must follow if a statute expressly empowers a local authority to do acts which cannot be done at all without infringing private rights. But, on the other hand, if the authority in performing its duty or exercising its powers exceeds their limits and infringes private rights, it will be liable. These principles are clear, but their application may involve difficulty.

Absolute and Conditional Statutory Authority.—If a statute provides that a local authority may or must do an act otherwise tortious, the doing of the act cannot be treated as actionable ; but the difficulty lies in determining what it is that the statute has authorised or commanded, for if these limits are exceeded the act remains so far illegal. This problem is obviously a matter of construction of the statute concerned (1). The courts in performing this task read statutes, which confer powers or impose duties, very narrowly, in order to limit to the smallest degree the interference with previously existing private rights which they sanction. Thus if the statute can be regarded as merely permitting a local authority to do something previously *ultra vires*, the courts will construe it as merely extending the local authority's inherent powers as a corporation and not as legalising interference with private rights. The statute, in other words, will be construed as saying that the local authority may do the act in question so long as it does not involve the commission of a tort. For instance, a statute simply giving power to build a small-pox hospital affords no

(1) *Price's Patent Candle Co., Ltd. v. London County Council* [1908] 2 Ch. 526 ; 38 Digest 45, 268.

defence to a local authority building it in such a position as to amount to a nuisance to private individuals (*m*).

But if the statute on a proper construction goes further than this and imperatively orders or specifically empowers the doing of an act even though it will interfere with private rights, it must be taken to have legalised all the acts reasonably necessary for the performance of the duty or the exercise of the power. In such a case the common law right of action is taken away, and the injured individual is left only to exercise any claim to compensation which the statute in question may confer (*n*). Thus, if a statute gives express power to construct particular buildings on a particular site to be put to a particular use, no liability can result from strict obedience to its terms (*o*). But even in these cases the protection afforded by the statute only extends to cover the acts expressly commanded or authorised and those results which must necessarily follow, and the onus of showing this lies on the defendant. Consequently, successfully to plead statutory command as defence to an action, a local authority must be able to show that it carried out its duties without negligence, for if harmful and avoidable acts were committed it will still be liable in spite of the statute (*p*). The principle is clearly shown in *Manchester Corporation v. Farnworth* (*q*). There the defendant corporation was specifically authorised by statute to build a power station upon a particular site. When the building was completed and the machinery was set in motion fumes were emitted which injured the crops of the plaintiff, a neighbouring farmer. To an action by the plaintiff the defendant corporation pleaded that it was protected from liability by the statute under which it had acted, since it was not reasonably possible to prevent the emission of harmful fumes

(*m*) *Metropolitan Asylum District v. Hill* (1881) 6 App. Cas. 193; 38 Digest 44, 256.

(*n*) *E.g.* Public Health Act, 1936, § 278.

(*o*) *Hammersmith, etc., Railway Co. v. Brand* (1869) L.R. 4 H.L. 171; 38 Digest 24, 132.

(*p*) *Geddis v. Bann Reservoir Proprietors* (1878) 3 App. Cas. 430; 13 Digest 399, 1223.

(*q*) [1930] A.C. 171; Digest Supp.

from the power station it had built. This defence was, however, rejected by the House of Lords, which held that the corporation was liable unless it could show that it was not reasonably possible to build a power station from which the emission of harmful fumes could be prevented, and that the mere fact that it was impossible to prevent fumes from escaping from the power station, which it had chosen to build, was not sufficient.

Put shortly, therefore, we may say that a mere statutory power in itself affords no defence to an action in tort, while statutory command or specific authorisation fulfilled without negligence does form a defence. Whether a particular statute confers a mere power or imperatively commands or authorises is a question of construction for the court, which leans in favour of preserving private rights wherever such a course is possible.

Failure to perform Duties or to exercise Powers.—So far we have seen that local authorities are liable when their servants in the course of their employment in doing positive acts have done them tortiously—that is, have interfered with private rights without justification. These are all cases of what may be called ordinary torts : we have been considering the protection which is afforded to local authorities where private individuals doing the same acts would have been liable. We have now to consider a further and different problem also arising from the fact that local authorities act under statutory powers and duties. Does the creation of powers or the imposition of duties by statute impose upon local authorities anything more than a duty to do the necessary acts carefully and properly if they are done at all ? Will an action lie at the suit of a private individual injured by a failure to perform statutory duties or to exercise statutory powers ?

Duties obviously imply the powers necessary for their performance, so it will be convenient, in order to answer these questions, to distinguish between discretionary powers and obligatory powers or duties. Purely discretionary powers

impose no duty : the local authority concerned may do certain acts if it sees fit, but it is not compelled to exercise its powers. In such a case the powers must be exercised carefully if they are exercised at all, but no action will lie simply because the powers are not exercised. For instance, if a local authority has a discretionary power to undertake the provision of street lighting and decides not to exercise the power, it is not liable to an individual injured in consequence of the dark condition of the streets at night (*r*). On the other hand, if the local authority does decide to exercise its powers, it comes under a duty to do so carefully, and if it fails to show due care it is liable for its negligence to an individual injured in consequence (*s*).

Obligatory powers impose a definite duty upon the local authority concerned to exercise them, and the performance of this duty can of course be enforced by appropriate proceedings of a public nature, such as an order of *mandamus* (*t*). There is, moreover, as in the exercise of discretionary powers, a duty to act carefully. Here, however, we are concerned to inquire whether a failure to exercise obligatory powers will give rise to an action at the suit of an individual injured in consequence. In other words, is a failure to perform a statutory duty itself a tort ?

The general rule to be applied in such cases is stated by Vaughan Williams L.J. in *Groves v. Lord Wimborne* (*u*) as follows :

(*r*) *Sheppard v. Glossop Corporation* [1921] 3 K.B. 132 ; 26 Digest 393, 1197. Contrast *Morrison v. Sheffield Corporation* [1917] 2 K.B. 866 ; 26 Digest 445, 1623, where the defendant corporation had erected a structure in the road which became dangerous through their failure adequately to light the neighbourhood. They were held liable, not for failing to light, but for failing to make the structure safe in the absence of light. Cf. *Caseley v. Bristol Corporation* [1944] 1 All E.R. 14, C.A., where a corporation was held not liable for failing to fence a dock basin near a highway.

(*s*) *Oldham v. Sheffield Corporation* (1927) 136 L.T. 681 ; 36 Digest 52, 322. Or it may, as in cases of erections in the highway come under an even stricter duty : *Polkinghorn v. Lambeth Borough Council* [1938] 1 All E.R. 339 ; 158 L.T. 127 ; Digest Supp. See also *Fisher v. Ruislip-Northwood Urban District Council and Middlesex County Council* [1945] 2 All E.R. 458, C.A.

(*t*) See above, Ch. XVII.

(*u*) [1898] 2 Q.B. 402, p. 415 ; 34 Digest 218, 1815.

“ it cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie*, and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty.”

This principle is, however, stated in a general form and in guarded language, and it makes clear that an action will only lie for failure to perform a statutory duty if the plaintiff can show that it is the intention of the statute to confer a right of action upon him, either as a specific individual or as a member of the class for whose benefit it was passed. This in effect means that an action will only lie when the statute confers a private right and does not simply impose a duty owed to the public at large.

The discovery of the statutory intention is a matter of construction and no definite rules can be laid down in this confusing and uncertain branch of the law (*v*). It is, however, clear that the provision by the statute of a specific remedy for a failure to perform the duty imposed by it, tends to show that it is its intention to exclude an action for damages (*w*), and this is even so when the specific remedy is an extra-judicial one, as by an appeal to a Minister or a resort to administrative default powers, such as those contained in the Public Health Act, 1875 (*x*).

Some cases go further and show a tendency to lay down as general principles that the whole of certain services, as, for instance, public health, are, apart altogether from the statutory

(*v*) On the whole subject see G. E. Robinson, *Public Authorities and Legal Liability*, Ch. IV.

(*w*) *Atkinson v. Newcastle Waterworks Co.* (1877) 2 Ex.D. 441; 38 Digest 56, 330.

(*x*) *Robinson v. Workington Corporation* [1897] 1 Q.B. 619; 38 Digest 55, 318; cf. *Pasmore v. Oswaldtwistle Urban District Council* [1898] A.C. 387; 38 Digest 154, 38 (duty to maintain proper sewers); *Saunders v. Holborn District Board of Works* [1895] 1 Q.B. 64; 38 Digest 33, 197 (duty to remove snow from the streets). As to these alternative remedies see above, Ch. XV.

provision of specific remedies, composed of a series of duties owed exclusively to the public at large, and so can never give rise to actions by individuals for failure to perform those duties (y). Other services, however, do give rise to private rights, and so a local education authority is liable to a child injured through failure to perform the duty of maintaining its schools in proper state (z)—though possibly this decision is to be explained on the ground that the authority committed a tort altogether independent of its failure to carry out the statutory duty.

Non-feasance and Mis-feasance.—In any case, as a definite rule well established, highway authorities are not civilly liable to a member of the public injured through their failure to maintain their roads in proper repair. Though liable for mis-feasance, they are not liable for mere non-feasance. If they repair a road in such a way as to cause dangerous cavities in its surface, they are liable for resulting injury to individuals: if they leave the road unrepaired so that the dangerous cavities develop naturally, they are not liable. This rule was finally established in the eighteenth century and was then based upon the principle that it was impossible to sue such an unincorporated body as a parish or county (a), and that the surveyor of highways was merely an agent to carry out the duties imposed, not on himself, but on the parish, and so was also not liable (b). Later, when the modern highway authorities were set up, their continued immunity for the consequences of non-feasance was rested upon the ground that, by a mere transfer of the powers of surveyors of highways, it could not have been intended to create any additional

(y) See, e.g., *Glossop v. Heston and Isleworth Local Board* (1879) 12 Ch.D. 102; 38 Digest 42, 249; *Robinson v. Workington Corporation* [1897] 1 Q.B. 619; 38 Digest 55, 318.

(z) *Ching v. Surrey County Council* [1910] 1 K.B. 736; 19 Digest 556, 17.

(a) *Russell v. Men of Devon* (1788) 2 T.R. 667; 26 Digest 587, 2780. For the history of the rule, see Holdsworth, *History of English Law*, Vol. 10, pp. 314-319.

(b) *Young v. Davis* (1863) 2 H. & C. 197; 26 Digest 398, 1241.

liabilities (c). However, the rule is based on substantive grounds of public policy and so equally exempts highway authorities whose duties are imposed upon them directly by statute and not by a mere transfer of the duties of the surveyor (d). This exemption of highway authorities is not favoured by the courts, which construe it narrowly. It is limited to the duty to repair, and any works executed in the highway, which cannot strictly be described as maintenance or repair, impose on the authority a positive duty to protect the public from the effects of deterioration. Thus the insertion of traffic studs (e), the erection of a street refuge (f), or the opening of a trench (g) are not mere works of maintenance or repair, and accordingly the highway authority, if sued by a person injured through their defective state, cannot plead that its failure to take adequate steps to prevent injury is a mere non-feasance for which it is not liable.

The definite rule established in the case of highway authorities has sometimes led to attempts at a generalisation producing a universal principle that local authorities of all classes, while liable for mis-feasance, are exempt from liability for non-feasance (h). But the modern tendency of the cases is to deny this as an illegitimate extension of the admitted exception existing in the case of highway authorities, and to regard the existence of a private right of action for a failure to perform statutory duties as simply dependent upon the intention of the particular statute in question, to be determined by judicial construction.

(c) *Cowley v. Newmarket Local Board* [1892] A.C. 345; 26 Digest 400, 1251.

(d) *A.-G. v. Todmorden Borough Council* [1937] 4 All E.R. 588.

(e) *Skilton v. Epsom and Ewell Urban District Council* [1937] 1 K.B. 112; [1936] 2 All E.R. 50; Digest Supp.

(f) *Polkinghorn v. Lambeth Borough Council* [1938] 1 All E.R. 339; 158 L.T. 127; Digest Supp.

(g) *Newsome v. Darton Urban District Council* [1938] 2 All E.R. 93; Digest Supp. See also *Drake v. Bedfordshire County Council* [1944] K.B. 620; [1944] 1 All E.R. 633; *Lewys v. Burnett and Dunbar* [1945] 2 All E.R. 555, *sub. nom.*; *Lewys v. Beccles Corporation and Others*, 109 J.P. 253.

(h) See *Saunders v. Holborn District Board of Works* [1895] 1 Q.B. 64; 38 Digest 33, 197; *Dawson & Co. v. Bingley Urban District Council* [1911] 2 K.B. 149; 26 Digest 407, 1286—where, however, it was also denied.

Section 2.—THE CONTRACTS OF LOCAL AUTHORITIES

Local Authorities as Corporations.—The peculiarities in the application of the ordinary law of contract to local authorities arise almost exclusively from the fact that these bodies are incorporated, and that like other corporations both their powers of contracting and the formalities necessary to be observed by them in entering into contractual relations are specially prescribed by the law.

The Doctrine of *ultra vires*.—The contracts of local authorities may be looked at from two points of view. In the first place, the doctrine of *ultra vires* must be remembered. All local authorities, other than municipal corporations, are incorporated by statute, and can only legally do those acts which they have, expressly or by necessary implication, been granted statutory power to do. Their contracts if *ultra vires* are therefore void. Municipal corporations, on the other hand, are Common Law corporations, and so directly exempt from the doctrine of *ultra vires*. Any contract made by one of them is therefore good ; but statutory regulation has prevented them from expending their funds or appropriating their property to any purposes which have not received the sanction of statute (i).

Illegality.—Closely related to this inherent restriction upon the contractual powers of local authorities is the application of the general principle that contracts cannot validly be made for illegal purposes. Because local authorities act under statutory powers and have statutory duties to perform, this general principle may take on a peculiar appearance when applied to certain contracts entered into by them. In this connection its application as annulling contracts on the ground of illegality arises from the fact that local authorities have no power to dispense with the operation of the law. Their duties are imposed upon them by law, and their powers are conferred upon them for the public benefit. Obviously a contract under

(i) See above, Ch. XII.

which a local authority agreed to forbear from carrying out any of its statutory duties would be illegal and void, but this is not all : a local authority cannot even contract so as to fetter the future exercise of its statutory powers (*j*).

Sealing.—In the second place, local authorities as corporations have to conform to certain rules regulating the manner in which their contracts shall be made in point of form. If the required formalities are not observed, the contract is in general unenforceable.

The statutory rules governing the making of contracts by local authorities are simple. The Local Government Act, 1933, recognises that local authorities “ may enter into contracts necessary for the discharge of any of their functions.” It also impliedly requires local authorities to make standing orders governing their procedure in making contracts, and “ in the case of contracts for the supply of goods or materials or for the execution of works ” these standing orders must in general provide for the publication of notice of their intention to contract and for tenders to be invited. It is also provided that all contracts made by a local authority “ shall be made in accordance with ” its standing orders. At the same time the Act absolves a person contracting with a local authority from the necessity of inquiring into the requirements of the authority’s standing orders, and prevents a contract otherwise valid from being attacked on the ground that the standing orders have not been complied with (*k*).

The general law prescribes that, with certain exceptions, a corporation shall only contract under its common seal. When the nature of a corporation is remembered this appears to be an intelligible requirement.

“ The seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however

(*j*) See *Birkdale District Electric Supply Co. v. Southport Corporation* [1926] A.C. 355 ; Digest Supp. On the same principle a statutory duty cannot be avoided on the ground of estoppel or mistake : *Sunderland Corporation v. Priestman* [1927] 2 Ch. 107 ; Digest Supp ; *Maritime Electric Co., Ltd. v. General Dairies, Ltd.* [1937] A.C. 610 ; [1937] 1 All E.R. 748 ; Digest Supp. (*k*) Local Government Act, 1933, § 266.

numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else" (l).

In general, therefore, every contract entered into by a corporation in order to be enforceable either by or against the corporation must be made under its common seal (m). This appears, however, to be merely a requirement of form and does not affect the essential validity of the contract (n), so that a contract made without the necessary formality may always be made enforceable by subsequent ratification under seal (o). One illustration of this general requirement of sealing occurs in the appointment of officers. Thus the appointment of a town clerk (p) and, in general, the appointment of officers, as opposed to mere servants, must be under seal (q).

Exceptions.—To this general principle, requiring the contracts of corporations to be made under seal, there is a series of exceptions which enable valid and enforceable contracts to be made on behalf of corporations without the necessity of affixing to them the common seal.

(i) **Express Exemption.**—The first exception occurs in cases where the constitution of the corporation itself exempts its contracts from the necessity of sealing. For instance a company incorporated under the Companies Act, 1929, may through an agent make binding simple contracts in any case in which an individual could validly contract without the necessity of a seal (r). At first sight it might be thought that the provisions of § 266 of the Local Government Act, 1933, amount to a similar exception in the case of local authorities, by substituting compliance with the local authorities' stand-

(l) *Per Rolfe B. in Mayor of Ludlow v. Charlton* (1840) 6 M. & W. 815, p. 823; 13 Digest 285, 170.

(m) *Mayor of Oxford v. Crow* [1893] 3 Ch. 535; 13 Digest 387, 1143.

(n) See Salmond and Winfield, *Law of Contracts*, pp. 484-486.

(o) *Brooks, Jenkins & Co. v. Torquay Corporation* [1902] 1 K.B. 601; 13 Digest 390, 1165.

(p) *R. v. Mayor of Stamford* (1844) 6 Q.B. 433; 13 Digest 381, 1108.

(q) *Smith v. Cartwright* (1851) 6 Ex. 927; 33 Digest 72, 462.

(r) Companies Act, 1929, § 29.

ing orders for the requirement of a seal. This, however, does not seem to be the true effect of the section: it nowhere expressly abolishes the necessity of a seal, and the implication to be drawn from its wording is that the standing orders are to deal rather with the steps to be taken in negotiating a contract than with the formalities to be observed in its execution. This conclusion is strengthened by the proviso exempting a contractor from the duty of seeing that the standing orders are followed, and preserving contracts, "if otherwise valid," although the standing orders were not in fact obeyed. This limits the scope of the standing orders to matters of internal management of the local authority's business. Indeed it would obviously lead to absurd results to suppose that the section permitted the form, in which a local authority's contracts should be executed, to be dealt with by standing orders; for, were this so, the proviso, exempting a contractor from seeing that the standing orders are followed, would be meaningless, since no contractor could be safe without examining the standing orders of the particular authority with which he was dealing.

Another statutory rule contained in recent legislation, which might be thought at first sight to exempt local authorities in general from the necessity of contracting under seal, must be considered. The Law of Property Act, 1925 (s), provides that

"... the council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent, either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument not under seal in relation to any matter within the powers of the corporation."

This appears to empower any corporation to contract through an agent without the necessity of a seal in respect of any matter not *ultra vires*. This, however, can hardly be correct, for it would effect a revolution in the whole law governing all corporations aggregate, and yet its limitation to agreements and

other instruments "not under seal" seems to recognise that some, at any rate, of a corporation's contracts must still be under seal. Presumably, therefore, the section must be read as admitting the power of the governing body, as opposed to the whole corporation, to appoint an agent authorised to execute contracts on behalf of the corporation, in those cases in which the corporation is permitted by the general law to contract validly without the necessity of sealing. It may safely be concluded that there is no general exemption for local authorities to the requirement that a corporation's contracts must be under its seal (*t*).

(ii) **Daily Occurrence or Urgent Necessity.**—Secondly, contracts relating to trivial matters of daily occurrence or urgent necessity may validly be made without the formality of sealing (*u*). This exception is indeed one of obvious necessity, for were it non-existent the business of many local authorities undertaking trading services would, unless a special exemption were included in the statutes under which they are carried on, be well-nigh impossible.

(iii) **Trading Corporations.**—Thirdly, trading corporations may through agents make valid simple contracts in matters relating to the objects for which they are formed (*v*). This exception to the general rule requiring a corporation's contracts to be under seal should be carefully distinguished from the second one previously mentioned. A trading corporation in relation to the business it was formed to carry on may make valid contracts not under seal, whatever the importance or value of their subject-matter. The second exception, however, only applies to matters of trivial importance, but, on the other hand, it extends to cover all corporations and is not confined

(*t*) As to the exceptional position of a parish council and the representative body of a parish, neither of which have a common seal, see Local Government Act, 1933, §§ 47 and 48; above, p. 47.

(*u*) *Wells v. Kingston-upon-Hull Corporation* (1875) L.R. 10 C.P. 402; 13 Digest 388, 1150.

(*v*) *South of Ireland Colliery Co. v. Waddle* (1868) L.R. 3 C.P. 463; 13 Digest 389, 1155.

to those engaged in trading. It does not seem to be clear whether the wider exception in favour of trading corporations applies to local authorities carrying on trading undertakings : in *Wells v. Kingston-upon-Hull Corporation* (w) it was expressly stated not to apply, but in *Bourne & Hollingsworth v. St. Marylebone Borough Council* (x) it was said to be applicable to the contracts of a local authority's trading departments when they were carried on under statutory powers, and on this last ground the earlier case, in which a municipal corporation was trading under its inherent Common Law powers, was distinguished.

(iv) **Contract executed.**—The fourth exception clearly illustrates that the failure of a corporation to contract under seal does not affect the intrinsic validity of the contract, but only prevents it from being enforceable. When the circumstances are therefore such as to make it unjust to rely upon the lack of form, the contract becomes enforceable. Where a contract made by a corporation in pursuance of its objects is not under seal but the consideration has been executed and the benefit of it received by one party, the other party, who executed that consideration and provided that benefit, may enforce the contract. Thus if the corporation executes its part it may enforce the contract against the other party who receives the benefit (y). Conversely, where work is done, or goods are supplied for the purposes of a corporation in pursuance of an order given by its regularly constituted governing body, and the corporation receives the whole of the consideration, it must pay the price agreed although the contract is not under seal (z). But in the case of certain local authorities statutory provisions formerly prevented this rule from applying. Section 174 of the Public Health Act, 1875, required contracts

(w) (1875) L.R. 10 C.P. 402; 13 Digest 388, 1150.

(x) (1908) 24 T.L.R. 322, p. 325; 13 Digest 389, 1156.

(y) *Fishmongers' Co. v. Robertson* (1843) 5 Man. & Gr. 131; 13 Digest 386, 1138.

(z) *Lawford v. Billericay Rural Council* [1903] 1 K.B. 772; 13 Digest 394, 1193.

exceeding fifty pounds in value made by *urban* sanitary authorities under the powers and for the purposes of that Act to be under seal, and therefore, even though the consideration had been wholly provided, an urban authority might plead the Act and escape liability (a).

The operation of this section of the Public Health Act, 1875, was unfair, and it was in consequence repealed by the Local Government Act, 1933, with the result that now all local authorities are in the same position in this respect, and are obliged to pay for the benefits they have received under contracts made by them in relation to their functions, even though those contracts were not made under seal (b).

(v) Part Performance.—The fifth exception is closely akin, in the principle upon which it is based, to the fourth, but it is a product of Equity, while the fourth is recognised by the Common Law. This fifth exception consists in an application to the contracts of corporations not under seal of the equitable doctrine of part performance. Either party to such a contract relating to land may obtain specific performance, where as a result of the plaintiff's acts of part performance it would be a fraud for the defendant to deny the relief prayed for (c). This principle is, however, strictly confined to the cases in which a verbal contract between individuals would be enforced : it is limited to enabling the plaintiff to obtain specific performance, and it will not apply to any class of contract to which

(a) *Young & Co. v. Leamington Corporation* (1883) 8 App. Cas. 517; 13 Digest 384, 1126. The section did not, however, go so far as to make it actually illegal for urban authorities to pay in such cases, and, if they chose to waive their defence under the Act, they could not be prevented from applying their funds in payment: *Bournemouth Commissioners v. Watts* (1884) 14 Q.B.D. 87; 13 Digest 385, 1133. Moreover the Act only applied to urban, and not to rural, authorities, and was limited in its application to contracts exceeding fifty pounds in value made under and for the purposes of the Act. Hence, if an urban authority made a contract without sealing under and for the purposes of a local Act, it could be compelled to pay for the benefits it received from its performance by the other party: *Douglass v. Rhyl Urban Council* [1913] 2 Ch. 407; 13 Digest 386, 1135.

(b) Local Government Act, 1933, § 266 and 11th Schd.

(c) *Crook v. Corporation of Seaford* (1871) L.R. 6 Ch. 551; 13 Digest 397, 1207.

this relief is inapplicable: for instance, the principle will not apply to enable a contract for work and labour to be enforced (*d*).

Section 3.—THE PUBLIC AUTHORITIES PROTECTION ACT, 1893

Statutory Protection.—In the nineteenth century the courts determined that the immunity of the Crown from legal process did not extend to afford protection to local authorities, and that the latter bodies were in no different legal position from that occupied by corporations trading for profit (*e*). In fact, however, the Legislature had already recognised the principle that public officers and authorities were entitled to some protection, at least from vexatious litigation. Many statutes had been passed which more or less protected constables, justices of the peace, and other authorities, and this process was continued to cover modern local authorities. These statutes were repealed and replaced by the provisions of the Public Authorities Protection Act, 1893, and justification for this partial inroad upon the Rule of Law must be sought in the consideration that, whatever their strictly legal position may be, local authorities do in reality occupy a very different position from that of trading corporations (*f*).

The Act applies when

“any action, prosecution, or other proceeding is commenced . . . against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority.”

It might be vainly wished that, had Parliament decided to confer protection upon public authorities, it would have used

(*d*) *Crampton v. Varna Railway Co.* (1872) 7 Ch. App. 562; 13 Digest 398, 1212.

(*e*) *Mersey Docks & Harbour Board Trustees v. Gibbs* (1866) L.R. 1 H.L. 93; 13 Digest 349, 880.

(*f*) This justification, however, seems not to take account of the fact that the protection of the Act extends to cover the trading activities of local authorities.

clearer language in which to express its meaning, for these words have led to a vast crop of cases and are so vague that even the keen judicial mind of Lord Haldane was unable to discover any principle in them (*g*). All that can be attempted here is to consider the different views which have from time to time been expressed in the cases.

To whom Act applies.—From the use of the words “any person” in § 1 of the Act (*h*) it might appear that any person whatever, who has acted in the circumstances envisaged by the Act, would be entitled to claim that it applies to proceedings brought against him. The courts have consistently held, however, that the Short Title of the Act must be read as limiting the otherwise boundless meaning of the word “person” and that the Act is in consequence confined to affording protection to public authorities and persons acting as their officers or under their direct mandate (*i*).

To what Conduct Act applies.—The Act, as amended by the Limitations Act, 1939, is restricted to proceedings

“for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty, or authority.”

The meaning of these words is, again, extremely difficult to discover. Obviously they must be construed so as to limit in

(*g*) *Bradford Corporation v. Myers* [1916] 1 A.C. 242, pp. 250–251; 38 Digest 110, 784.

(*h*) § 1 (*a*) of the Act is repealed by § 34 (4) of, and the Schedule to, the Limitation Act, 1939, except so far as it relates to criminal proceedings, and is replaced by § 21 of the Limitation Act, 1939, which, however, uses the same phrase. As to the effect of this replacement, see below, p. 459.

(*i*) See, e.g., *Bradford Corporation v. Myers* [1916] 1 A.C. 242, p. 247; 38 Digest 110, 784; *T. Tilling, Ltd. v. Dick, Kerr & Co., Ltd.* [1905] 1 K.B. 562. It covers managers of a non-provided school in the exercise of their statutory duty under the Education Act, 1921: *Greenwood v. Atherton* [1939] 1 K.B. 388; affirming, [1938] 2 All E.R. 475; Digest Supp. It does not, however, cover the governors of a secondary school endowed under a scheme of the Board of Education under the Endowed Schools Acts, 1869–1889; and this even though grants might have been made to the school out of public funds: *Woodward v. Hastings Corporation* [1944] 2 All E.R. 565. Nor does it cover a local authority acting as agent for the Ministry of Transport in relation to a trunk road: *Drake v. Bedfordshire County Council* [1944] K.B. 620; [1944] 1 All E.R. 633. Arising from this case, *quaere* the position of one local authority acting as agent for another under §§ 88 and 274 of the Local Government Act, 1933.

some way the protection which the Act confers. Lord Buckmaster L.C. explained this limitation (j) as follows :

“ It is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard those latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply.”

The Act, for instance, will cover the purely trading undertakings of a local authority carried on under statutory powers, so long as the breach of public duty or authority is made the basis of the claim. Thus an action arising out of an accident occurring through the running of a tramway is within the Act, since the local authority is under a duty to carry any passengers who present themselves, and so in carrying on its service is performing a duty to “ all the public alike ” (k). Similarly an action for wrongful dismissal brought by one of its officers against a local authority is within the Act (l). But an action for the breach of a contract voluntarily entered into by a local authority, even though under statutory powers, is not within the Act (m), and this is so even though the breach of contract is also an independent tort. Thus in *Bradford Corporation v. Myers* (n) the defendant corporation had statutory powers to make and supply gas, and as incidental thereto to sell or otherwise dispose of the residual products, such as coke. It sold some coke to the plaintiff, and its employees in delivering it negligently broke the plaintiff's

(j) *Bradford Corporation v. Myers* [1916] 1 A.C. 242, p. 247 ; 38 Digest 110, 784.

(k) *Lyles v. Southend-on-Sea Corporation* [1905] 2 K.B. 1 ; 38 Digest 102, 733.

(l) *MacManus v. Bowes* [1938] 1 K.B. 98 ; [1937] 3 All E.R. 227 ; Digest Supp.

(m) *Sharlington v. Fulham Guardians* [1904] 2 Ch. 449 ; 38 Digest 109, 783 ; and see also *Hawkes v. Torquay Corporation* [1938] 4 All E.R. 16.

(n) [1916] 1 A.C. 242 ; 38 Digest 110, 784.

windows. The plaintiff's action was held by the House of Lords not to be within the statute, for the act complained of was committed in pursuance of a purely private duty of care arising either out of the contract or imposed by the general law of torts.

For an act to be an "intended" execution of an Act of Parliament, public duty, or authority it seems to be necessary that the Act, public duty, or authority should actually exist. So an act done in the mistaken belief that such a justification exists is not within the protection of the Act of 1893, but if the statute, public duty, or authority does exist and the mistake is merely one of fact, it is protected (*o*). In any case, to plead the Act of 1893 the defendant must have been *bona fide* intending to act in pursuance or execution of the particular statute or public duty or authority in question: any malicious abuse of power, as by exercising an authority for improper purposes or beyond the limits of statutory justification, is outside the protection of the Act (*p*).

To what Proceedings Act applies.—Furthermore, the limits of the Act, with respect to the type of legal proceedings to which it applies, are not free from doubt. The Act speaks of "any action, prosecution, or other proceeding," but some limitation upon the apparent generality of these words has been imposed. The Act applies to ordinary civil actions at law or in Equity for damages or an injunction or declaration; and, although it speaks of "any action . . . for an act *done*," it has been held to apply to an action for an injunction *quia timet* to restrain the doing of a threatened tortious act (*q*). Again, actions by the Attorney-General for a declaration or injunction to restrain excess of statutory powers or interference with public rights (*r*) are probably

(*o*) *Betts v. Receiver for the Metropolitan Police District* [1932] 2 K.B. 595; Digest Supp.

(*p*) *G. Scammell & Nephew, Ltd. v. Hurley* [1929] 1 K.B. 419; Digest Supp.

(*q*) *Graigthorpe Merthyr Co. v. Swansea Corporation* [1929] A.C. 344; Digest Supp.

(*r*) See above, pp. 380-383.

within the Act, in spite of the fact that it expressly excludes from its scope proceedings brought by "any department of the Government against any local authority or officer of a local authority" (*s*). On the other hand, it seems that the Act has no application to proceedings for orders replacing the prerogative writs (*t*), nor to proceedings under the Workmen's Compensation Acts (*u*).

Protection afforded by Act.—It remains to consider the effect of the Public Authorities Protection Act, 1893, as amended by the Limitation Act, 1939, in the cases to which it does apply. The Act was passed to consolidate and generalise a large number of statutory provisions designed to afford to public authorities and officers some degree of protection in litigation, and this purpose it effects in four ways. In the first place it imposed an unusually short period of limitation for the commencement of the proceedings to which it applies. They had to be

"commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

The effect of § 21 of the Limitation Act, 1939, is to increase this period to one year. The proceedings must, in fact be

"commenced before the expiration of one year from the date on which the cause of action accrued :

Provided that where the act, neglect or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued, for the purposes of this subsection, until the act, neglect or default has ceased."

The section does not, however, apply to criminal proceedings (*v*), in relation to which § 1 (a) of the Act of 1893 is not repealed.

(*s*) *A.-G. v. West Ham Corporation* [1910] 2 Ch. 560 ; 38 Digest 121, 873.

(*t*) *Roberts v. Battersea Metropolitan Borough Council* (1914) 110 L.T. 566 ; 38 Digest 119, 861 ; *R. v. Port of London Authority* [1919] 1 K.B. 176 ; 38 Digest 121, 885 ; *R. v. Carter* (1904) 68 J.P. 466 ; 38 Digest 121, 887 ; *R. v. London County Council* (1929) 141 L.T. 590 ; Digest Supp.

(*u*) *Tuckwood v. Rotherham Corporation* [1921] 1 K.B. 526 ; 38 Digest 123, 911.

(*v*) § 21 (2).

This is a fairly straightforward provision : public authorities are entitled to know quickly whether litigation is to be commenced against them and not to be kept in suspense for long periods (*w*). The old provision produced some curious results. In the case of a tort, in which the cause of action is not complete without the causing of actual damage, the six months' period under the Act began to run from "the act, neglect, or default," and not from the accrual of damage caused by it. If the latter event did not happen until more than six months after the former, the result was that the Act served to bar a cause of action before it had come into existence and the plaintiff never could sue (*x*). Again, in actions under the Fatal Accidents Act, 1846, time begins to run from the date of the injury to the deceased, and not from the date of his death, so that, if the latter event occurred more than six months after the injury which caused it, any action by the deceased's representatives was altogether barred by the Act of 1893 (*y*).

The use of the words "date on which the cause of action accrued" in the Act of 1939 has now served to overcome this difficulty.

On the other hand, an omission, as opposed to a positive act, is usually a continuing wrong so long as the duty remains unfulfilled, and in such cases, so long as the damage also continues, the cause of action is kept alive (*z*). Further, in the case of a continuing wrong of a kind which produces fresh damage *de die in diem*, as for instance a continuing trespass to land, the injured party may sue at any time within twelve months of its ceasing, and may then recover damages to com-

(*w*) Formerly there was no provision exempting infants from the operation of the Act: *Jacobs v. London County Council* [1935] 1 K.B. 67; Digest Supp.; but see now § 22 of the Limitation Act, 1939.

(*z*) *Freeborn v. Leeming* [1926] 1 K.B. 160; 38 Digest 130, 955.

(*y*) *Williams v. Mersey Docks & Harbour Board* [1905] 1 K.B. 804; 36 Digest 131, 870. But if the deceased's right of action was not barred at the time of his death under the Act of 1893, it seems that an action may be maintained under Lord Campbell's Act within twelve months of his death: *Venn v. Tedesco* [1926] 2 K.B. 227; 36 Digest 131, 871.

(*z*) *Huyton & Roby Gas Co. v. Liverpool Corporation* [1926] 1 K.B. 146; 38 Digest 129, 949.

pensate himself for the harm which has arisen within the previous six years—the ordinary period of limitation (a).

The Act of 1893 further contains three sets of provisions putting the persons and bodies whom it protects in a favoured position as regards costs. An unsuccessful plaintiff must pay the defendant's costs as between solicitor and client instead of on the lower scale as between party and party. Again, if the claim is for damages, the defendant may before the action is commenced tender a sum by way of amends. If this is refused, tender may be pleaded, and then if the plaintiff fails to obtain by way of damages a greater sum than the amount tendered, he gets no costs, and, even though successful, has to pay the defendant's solicitor and client costs. Lastly, in order to render these provisions workable by giving the defendant an opportunity to make a tender, if the plaintiff fails to give to the defendant sufficient notice of his claim before commencing his action, the court may give the defendant solicitor and client costs, even though the plaintiff is successful.

(a) *Earl of Harrington v. Derby Corporation* [1905] 1 Ch. 205 ; 38 Digest 127, 934.

PART III

LOCAL GOVERNMENT SERVICES

SUMMARY

	PAGE
Introduction	465
CHAPTER XX. Public Health	481
CHAPTER XXI. Housing	516
CHAPTER XXII. Town and Country Planning	542
CHAPTER XXIII. Highways, Streets and Bridges	569
CHAPTER XXIV. Rivers and Streams	617
CHAPTER XXV. Police	638
CHAPTER XXVI. Poor Law (Public Assistance)	666
CHAPTER XXVII. Education	693
CHAPTER XXVIII. Trading Undertakings	739
CHAPTER XXIX. Licensing	773

INTRODUCTION TO PART III

Introduction.—We have now surveyed the legal principles governing the constitution of local authorities, and their relations with the State, the law and the public. It remains to consider the various services which local authorities are required or empowered to undertake, and the machinery and powers with which they are provided for that purpose. Before going into such detail as is possible in a work of this kind, some general observations may be offered.

Local Acts.—In the first place it should not be overlooked that all the large municipal corporations and many of the remaining borough councils and other local authorities conduct their administration to a large extent under powers conferred on them by local Acts, so that a survey of the law as it generally affects local authorities (which is all that can be here attempted) may fail to give a correct presentment of that law as it exists in a particular area. These local Acts are in many cases lengthy and numerous, and complaint is sometimes made that it is difficult to ascertain what is the law in a particular district in respect to questions that under the general law are capable of ready discovery. Prints of local Acts are usually not readily obtainable, and the difficulty is thereby increased. But while there is force in these criticisms (which to some extent apply also to local bye-laws) there are three countervailing considerations which modify their importance. First, parliamentary Committees do not approve or numerous local Acts being kept in force in an area, particularly those that date back for a considerable period, and it has been their practice, when a Bill is promoted by a local authority (usually a borough) which has a series of local Acts, to press the council

of that authority to undertake within a comparatively brief period to bring up a Consolidation Bill for the purpose of reducing its various local Acts into one single Act. The Consolidation Act is almost necessarily shorter in volume than the total length of the Acts it supersedes, some parts of which have become out of date, or are practically repealed by later Acts. In this way local Acts are from time to time modernised with much advantage to those whose business it is to administer or understand them. Secondly, local Acts are usually in the form of extensions of public Act powers. They are not inconsistent with the provisions of the public Acts (the Public Health Acts, for instance), but they extend the powers of the general Acts. And lastly, many of the provisions contained in local Acts are proved by experience to serve useful purposes and are brought into wider use by one of two methods. Parliamentary Agents year by year, in Bills they are promoting for local authority clients, insert clauses taken from recent local Acts, which readily find acceptance on the part of parliamentary Committees because they have already been approved in earlier Acts. Then again from time to time general Acts incorporate the most useful new powers embodied in local Acts and lift them into general currency. In this way much public health legislation has grown up and such a statute as the Restriction of Ribbon Development Act, 1935, comes into being. The local Acts are thus a means of testing new powers, some of merely local interest, others proving to be of doubtful worth and therefore becoming sterile, while still others meet a felt want and attain a wider and even national effectiveness. This process is continually going on.

Extension of Public Services.—In the next place attention may be drawn to the growth and to the present size and variety of the operations of local authorities. The beginnings of local government were small and its scope was in itself unimportant. Apparently the idea of submission to rule and government was distasteful and was only assented to so far as necessity required. To foster trade and to remove obvious nuisances were practi-

cally the only purposes for which local government was thought to be needed. The individual did not wish to have his own rights curtailed for the general good ; he had no wish to be governed. The Tudor legislation, particularly as it dealt with land drainage, highways and the care of the poor, marked an advance in the idea and the practice of local government. Later, another halt was called and little more was done to advance local government until changing conditions in the eighteenth century called for an extension of powers, a need that was sought to be met by the appointment by local Acts of bodies of commissioners which set the fashion for the creation of various *ad hoc* authorities. In this way only pressing and essential services found acceptance ; the idea of a comprehensive system of local government lay in the future.

Framework of Local Government.—The supreme merit of the Municipal Corporations Act, 1835, was that it provided a framework for local government services. As already pointed out, it produced little for the newly constituted municipal corporation to do—the control of the police and the management of corporate property and a few other powers comprise all the functions it bestowed. But it solved the problem of creating an organisation fitted to discharge the powers and duties, infinitely greater than were then thought of, that subsequent Parliaments have imposed upon it. It widened the scope of the electorate and gave it an effective interest in the affairs of the town, it ensured the annual renewal of a part of the ruling body and thus kept the electors and their representatives in constant touch to their mutual good, and it created a hierarchy of representatives that gave incentive to the elected to seek higher posts and to feel that the dignity of the mayoralty was not beyond the possibility of attainment. Above all, with the power of recourse to the rates, it provided an organisation able to serve the interests of the town effectively and to undertake duties which voluntary effort was incapable of sustaining. It gave recognition and status to the chief officers and started the authorities' finances on a sound basis.

On such a foundation it was possible to build a sound structure, and when new duties were imposed on the local authorities they had the means of readily assimilating the new impositions. Thus, as we look back, it appears really inevitable that the *ad hoc* authorities should have been superseded and their powers absorbed by a more effective mechanism, and it was equally certain that any new powers should be conferred upon the same authority. The passage of time has, however, tended to make the municipal corporation disappear behind the borough council. The original scheme of the Municipal Corporations Acts was to make the borough council merely the executive organ of the wider municipal corporation. Later legislation has, however, consistently conferred new powers directly upon the borough council, which has thus become the local authority for the administration of many diverse services. In this respect it has proved its effectiveness by being taken as the model for the constitution of the county councils and urban and rural district councils brought into being by the legislation of 1888 and 1894, and by the enormous extent of new powers it has constantly had placed upon it. Local government has ceased to be looked upon as a burden to the individual citizen, to be limited as much as possible because it restricts his freedom ; it is realised that in its ever-widening scope it is of increasing service to the community and on the whole benefits the individual at the same time.

Trading Services.—It is not proposed to trace the history of this change in the idea of government as applied to local affairs, but if, for instance, the year 1875, in which Public Health legislation took its modern form, is taken as a starting point, we shall see that the growth in power and the increase of responsibility falling upon local authorities have been considerable since that time. Advancing civilisation and the marked rise in the standard of living have made immense demands upon the community for new and extensive services, some of which cannot be supplied by private effort, while others

can be given at least as satisfactorily by public organisations, represented either by the State or by the local authorities, as by private enterprise. In the last decade of the century many municipal boroughs obtained powers to operate tramway services, an innovation that was strongly but ineffectually opposed by those who disliked all extensions of municipal trading. While local authorities had previously owned various utility undertakings, such as gas, water and electricity, this had been justified or condoned on the ground that the services were in the nature of monopolies which could with advantage be controlled by the local authority. The transfer of transport services to municipal ownership and management was deemed by its opponents to be in itself a method of competitive trading and the probable precursor of still further inroads into the sphere of private business enterprise.

From the commencement of the present century there has been a marked acceleration of the pace at which the local government services, particularly those imposed upon municipal corporations, have been extended. This acceleration applies least of all to what are usually known as trading services, namely markets, water, gas, electricity and transport (*a*). Gas, water and electricity services are operated either by the local authority or a combination of local authorities, or by private undertakers, usually in either case with advantage to users, for it cannot be said, as between public and private ownership, that one method of control and management shows a marked superiority over the other. There is considerable discussion at the present time as to the ultimate ownership of gas and electricity services (*b*). The generation of electrical energy has become a question of national importance, and is conducted under the direction of the Central Electricity Board. Only the largest municipalities are likely to retain and develop this branch of electric supply. Proposals fitfully

(*a*) A new service, however, that of the provision of aerodromes, was made available to certain local authorities by the Air Navigation Acts, 1920 and 1936.

(*b*) Save, perhaps, that the larger local authorities have been able to borrow capital more cheaply than many other statutory undertakers. The Government's present proposals, of course, involve the nationalisation of these services.

raised to enable local authorities to sell coal and milk in their own districts are at the present time at a standstill, and the even wider proposals, which once obtained party support, to enable local authorities to carry on all such business undertakings as could be embarked upon by limited liability companies incorporated under the Companies Acts, have been quietly dropped. At the present time there is no active propaganda in favour of the granting of new trading powers to local authorities. Whether the return of more settled times will induce a revival of such projects can only be a matter of guesswork.

Extensions of Existing Services.—While issues of policy in regard to trading services have not been actively before the public until recently, legislation has during the present century brought about a marked development of local government services in other directions. In the first place there has been a natural and normal extension of services previously in existence. Possibly the public health service is the most striking illustration of this development. In some respects the public health service, taking that expression in its widest signification, may be considered to be the foundation of all the local government services. In the re-organisation of authorities which commenced in the latter part of the nineteenth century, it was the public health authorities which were singled out to become the general local authorities for the modern system of local government. The transformation of the Local Government Board into the Ministry of Health was much more than a change of name or emphasis ; it signified that the future policy of the Department should be primarily based on considerations of health (*c*). Public health legislation also illustrates the general experience that, when a public service is initiated, it is inevitable that its requirements should grow, possibly slowly at first, but as years pass by at an increasing rate. Medical research has shown that many evils may be

(*c*) The police administration was of course outside public health, but it is a service not wholly dependent upon the activities of the local authority ; it is one in the control of which the State also is vitally interested.

cured, and, what is still better, may be prevented by the exercise of wise forethought and prudent action, and this cannot be effectively secured by appeal merely to the intelligence of the individual. To effect such a purpose there is need for the constitution of public authorities with the requisite powers of compulsion and finance.

Extension of Health Services.—For example, the problem of the heavy death rate of mothers and infants has led to increasing provisions being made for advising mothers with respect to the care of their own health and that of their children, with the result that the death-rate of young children has been greatly reduced, though unhappily the deaths of young mothers still remain distressingly numerous. For the purpose of this service doctors and nurses directly employed by the local authority have been engaged and clinics and hospitals have been provided, while for those not able to benefit directly by the latter a domiciliary service of midwives has been provided. Yet fifty years ago the provision of these services was not considered to be in any way within the duties of the local government authorities. Great extensions of the health services have been proposed in the White Paper on "A National Health Service" (*d*) and are now under discussion by the Government and the interests concerned.

Housing Legislation.—Another illustration of this development of a public service is seen in the housing legislation of this century. The Housing of the Working Classes Act of 1890 was the outcome of revelations of the distressing conditions of slums and slum dwellers which were made known as a result of the labours of the Royal Commission on the Housing of the Working Classes. But it was not until the present century that the question of housing really became acute. The intention of the framers of the Act of 1890 was that local authorities should supplement private enterprise in building houses for the working classes, and that unhealthy houses and insanitary areas should in

course of time be swept away. In the first decade of the present century private effort almost entirely ceased to build working class houses, and it became necessary to give greater powers to the local authorities to make good the deficiency, and this was sought to be achieved by the Act of 1909. During the War of 1914-18, the erection of houses, except in certain munition areas, was entirely stopped. At the close of the 1914-18 War there was an appalling shortage of houses, and the country had to face the position that thousands of the men who had fought during the War were returning without having homes fit to live in. The Act of 1919 placed on the local authorities, under the supervision of the Ministry of Health, the duty to make good the shortage, and lavish grants were for a time made to enable houses to be built. Acts of 1923, 1924 and 1925 conferred further powers to solve the problem, while the Housing Act of 1930 enabled a frontal attack to be made on the slums. The growing stress of housing problems had enlarged the conception of national duty to solve them. The State and the local authorities—the one by supervision and percentage grants, the other by practical effort and a heavy draft on the rates—were required, not to supplement the efforts of others, but to be responsible for making good the actual shortage of houses, and between them to make up the loss inevitably caused by the fact that the rents which tenants could afford to pay would not defray the interest and maintenance charges necessarily incurred.

For some time private enterprise was subsidised in the provision of new dwelling-houses, but that has been discontinued. In 1933 the Minister of Health issued an appeal to all housing authorities to expedite the removal of slums in their districts, and to submit schemes for the clearance and improvement of unhealthy areas within a period of five years. In the result there was a marked acceleration of slum clearance activities. In addition, the shortage of housing accommodation still called for urgent attention, and could only be made good by means of large grants by the State and contributions

out of the rates, while a duty to abate overcrowding was emphasised by the Housing Act, 1935 (*e*). And the special problem of rural housing needs is rooted in the comparatively low rent-paying capacity of the agricultural population.

The 1939-45 War, which put a stop to practically all house building, coupled with the loss of accommodation due to war damage and the standstill on slum clearance work, has created even greater problems than those which existed after the 1914-18 War. The Housing (Rural Workers) Act, 1942, made a very small attempt to deal with some of the problems of accommodation for agricultural workers, and a start on post-war plans has now been made with (1) the Housing (Temporary Provisions) Act, 1944, which temporarily enables subsidies to be paid in respect of houses built by local authorities to meet general needs and enables land to be acquired compulsorily without the holding of a public local inquiry, and (2) the Housing (Temporary Accommodation) Acts, 1944 and 1945, which make provision for the erection of temporary houses. The rates of subsidy have not yet been fixed, though a Bill for this purpose is now before Parliament.

Social Legislation.—Other factors, which have affected the scope of the duties of local authorities during the present century, have been the introduction of social legislation, the outbreak of the War and the evil of unemployment during recent years. The social legislation, dealing with national health insurance, old age pensions and unemployment insurance, provided services which might have been administered by local authorities or by the State or partly one and partly the other. The Unemployed Workmen Act, 1905 (*f*), provided for the setting up, in each municipal borough and urban district with a population of not less than fifty thousand, of a distress committee of the council for the purpose of endeavouring to obtain work. Had this policy been pursued, the administration of unemployment legislation might have

(*e*) This Act and previous Housing Acts were repealed by and re-enacted in the Housing Act, 1936.

(*f*) Now repealed.

remained with the local authorities, but the passing of the Labour Exchanges Act, 1909, which authorised the Board of Trade to establish and maintain labour exchanges in such places as it should think fit, was indicative of a change of policy on the part of the State, and from that time unemployment has been dealt with generally as a matter of State obligation and administration.

Temporary Legislation.—The outbreak of the War led to the passing of many Acts, almost entirely of a temporary nature, which imposed new obligations on the local authorities. Most of these statutes ceased to be effective with the cessation of war, but the varied experiences then gained showed that local authorities were capable of sustaining new responsibilities, and in more prosperous times than the present it may well be that useful powers created in an emergency may be revived and effectively operated during normal periods by local authorities.

Unemployment Relief Works.—The alarming increase in unemployment since the end of the 1914-18 War led to a call upon local authorities, particularly municipal corporations, to undertake new responsibilities. The Government policy on this question has changed from time to time since 1922, when the trade boom that followed the War declined and was followed by exceptional distress and unemployment. It appeared to be the opinion of the Government at that time that the prevalent state of unemployment would not be of long duration, and consequently that temporary employment on useful public works would largely solve the problem. Industry was of course unable to assist, and the Government was not capable (except to some extent through such Departments as the Post Office) of providing the necessary means of employment. It therefore approached the local authorities and invited their assistance. The local authorities agreed to start various works which would provide temporary employment for the unemployed, but, as it was recognised that they would be put to extra expense, both by reason of employing unskilled

labour and also by constructing works in anticipation of requirements and so making themselves responsible for their maintenance before they came into full use, it was agreed that the Government should make substantial contributions to the total cost. The most popular class of relief works was the widening and straightening of existing roads and the construction of new roads. It was found that works of this class ensured the spending in wages of a greater proportion of the cost than in any other form of relief works. As the position grew worse and the local authorities had fewer anticipatory works that they could provide, the Government increased its subsidies. At a later period the policy of the Government was changed, and the carrying out of works not immediately required by local authorities was discouraged. The prolongation of serious unemployment and the insufficiency of relief works to meet the situation eventually led to the establishment of the Unemployment Assistance Board which was equipped to deal with the question of unemployment on a national basis.

An attempt has been made to anticipate any similar trend during the present reconstruction period in the Distribution of Industry Act, 1945.

New Duties.—Fresh illustrations of the suitability of the local authorities to undertake new duties necessitated by the changing circumstances of the times were furnished before the present war by the passing of two Acts—the Physical Training and Recreation Act, 1937, and the Air-Raid Precautions Act, 1937 (*g*). In the one case it was determined to put forward a strong effort to improve the physique of the people of this country, and opportunities of physical development are to be afforded to all. In this connection local effort is essential and appropriate duties were placed on the local authorities. In the other case Parliament was firmly convinced of the urgent need for securing protection of persons and property from injury in case of attacks by air in war-time ; and has required various

(*g*) This Act was extended on the outbreak of war by the Civil Defence Act, 1939, and, under that Act and Defence Regulations, local authorities were required to undertake, during the war, a very great number of duties connected with various branches of the defence of the country.

local authorities to prepare and submit to the Home Secretary, and, if need be, to put into operation schemes for protecting the public and property and minimising danger in case of hostile air-raids.

Expenditure of Local Authorities.—The great variety of services administered by local authorities is thus apparent. The administration in a single area by one authority of the great services of public health, poor law, police, education and highways, together with, in the case of many municipal authorities, such undertakings as markets, water, gas, electricity and transport, gives some general indication of this variety. The extent of services afforded is indicated by the enormous sums of money raised to carry on the ordinary functions of local authorities (*h*). The larger trading undertakings will compare in extent and financial responsibility with some of the commercial companies having a national reputation, and the rapid increase in recent years of responsibilities placed by Parliament on local authorities is further evidence of confidence in the general qualifications of those authorities for the proper discharge of public duties.

Services committed to Joint Bodies.—Note may also be made of the fact that, alongside and to some extent in opposition to the general present-day tendency to centralise all the local government activities of an area in one authority, there are many services in respect of which experience is showing that areas of larger extent are requisite for ensuring efficient and economical management. Illustrations of the latter tendency are the abatement of smoke, water supply, town planning and drainage and embankments. In order to obtain areas large enough for efficiency, these and similar services can be administered in various ways.

1. The first method that should be mentioned is the constitution of a Board by special local legislation. This is only

(*h*) The total expenditure of all local authorities on revenue account has risen from £387·9 millions in 1927/8 to £470·9 millions in 1935/6 (of which latter sum £122·9 was in respect of trading services and corporation estates), and in 1940/1 to £693·1 millions.

suitable for concerns of considerable magnitude. For example, the Derwent Valley Water Board was constituted by an Act of 1899 to enable a supply of water from the Derwent Valley watershed to be afforded to the towns of Derby, Leicester, Nottingham and Sheffield in fixed statutory proportions, at the joint cost of those authorities in the same proportions. There was a variation in this procedure in the case of one of the Manchester water supply schemes, under which the whole of the works were constructed and are maintained by and at the cost of the corporation of that City, which nevertheless is placed under statutory obligation to supply certain specified districts with fixed quantities of water at practically cost price (*i*).

2. A second method is to constitute a joint committee to administer a service on behalf of two or more authorities. This procedure is inexpensive and effective. Usually the joint committee can be constituted by order of the Minister of Health (*j*). Representation is based on the extent of interest of the various constituent bodies in the service. The expenses of administration are provided by the constituent authorities upon an agreed basis of apportionment.
3. Akin to this is the formation of a joint board under general legislation, *e.g.* a responsible authority under the Town and Country Planning Act, 1932, or a joint board under § 6 (2) of the Public Health Act, 1936.
4. An *ad hoc* authority may be appointed under a general Act; for example, catchment boards under the Land Drainage Act, 1930.

(*i*) The Rural Water Supplies and Sewerage Act, 1944 (partly replaced by the Water Act, 1945), goes some way towards making one or other of these courses compulsory upon local authorities in order to ensure the provision of an adequate water supply to all rural localities.

(*j*) Or, in the case of a joint committee for the purpose of preparing a planning scheme under the Town and Country Planning Acts, by the Minister of Town and Country Planning.

5. There are instances in which a local authority is jointly interested with a trading undertaking in a particular project. The most striking illustration of this is the Manchester Ship Canal, towards the cost of which the Manchester Corporation has contributed several millions of pounds. In consideration of this substantial interest the Council of the City of Manchester has the right to appoint representatives on the directorate of the Canal Company. Such cases are infrequent, however, and invariably arise from special local circumstances. Another more general illustration is found in the joint electricity authorities which may be constituted under the Electricity (Supply) Acts, and which are managed by representatives of the local authorities and electric power companies.

Statutory Schemes.—As showing tendencies in matters of the procedure governing the administration of local government services, reference may be made to recent statutes which require a local authority to prepare a plan or scheme and obtain the approval of the appropriate Department of State before a new or transferred service becomes effective. This procedure has been applied in relation, among other cases, to education and public assistance. The practice has manifest advantages. General legislation having decreed the extent and nature generally of the service to be administered, the plan or scheme sets out in some particularity the methods by which the authority proposes to administer its new duties. This involves a statement of the methods which the authority intends to pursue, and cannot but be helpful to those undertaking a new enterprise. The scheme must of course be within the powers of the Act, while the necessity for securing its approval by the Central Department ensures consideration from the national as well as the local aspect of the question. The making of a scheme does not relieve the authority from supervision by means of orders and regulations issued by the Central Department, but it does enable the local authority, within those limits, to

exercise its own judgment upon a question of local concern. In the latter respect it is on true lines of local administration.

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Arrangement of Third Part.—The question of the order in which local government services shall be taken is not of primary importance, but it calls for attention. Historical order has much to commend it, as showing what are the communal demands which are first made when local government becomes practicable and how from time to time fresh requirements arise. This aspect, however, may be considered to have been sufficiently discussed in the early chapters of this book. On the whole it may be more satisfactory to look at the services as they exist to-day and see in what groups they can be treated. In this view the claim of public health for first consideration seems to prevail. Public health, while one of our modern services, has extended more widely than any other.

That being so, it would appear that the housing and planning services come next, because, though they are of recent inception, they have from the first been treated as extensions of the public health service and indeed bear directly upon the health of the community. The subjects of public health, housing and planning accordingly form our first group.

The next group, the services relating to highways and bridges, and rivers and streams, while associated to some extent with public health, are of much earlier date and are distinguished by not being limited to any particular local government area. The river runs through many districts, but is bound in its activity to none, and the road, more particularly in these later days, serves the public irrespective of local or regional boundaries.

The third group directly affects the individual, and, while it includes the police service designed for the protection of the whole community, it also comprises services which are provided for the benefit of special classes of people. These are poor law and education, to the cost of which all ratepayers and

taxpayers are called upon to contribute, but from each of which only a limited class is enabled to benefit.

We then come to the group of trading services, and these, beginning in most instances in association with public health, have grown in extent and variety, and are now substantive departments of our local government organisation. They are limited, not in respect of the classes of people whom they serve, but in the fact that as a rule they are only exercised by a certain class of local authority, and not by all. Speaking generally, these services are only carried on by the councils of boroughs and urban districts.

Finally, though this list makes no pretence of completeness, it is desirable to touch upon a branch of local administration of considerable importance. Some licensing functions are within the activities of local authorities, but not inconsiderable duties are performed by bodies which are not themselves local authorities, and some mention of these matters must be made.

CHAPTER XX

PUBLIC HEALTH

PUBLIC health has come not only to embrace within itself a vast number of particular services all designed to promote the healthy development of the community, but also to be the pre-eminent local government service, a fact testified to by the existence, as the Central Department most closely concerned with local authorities, of the Ministry of Health. This stage of recognition was not, however, generally reached until the Royal Sanitary Commission reported in 1871. Its history before this date is a confused medley of authorities and functions, and indeed it was not until the outbreak of cholera in 1831-32 that the provision of services to promote public health became recognised as a definite aim of State action.

Law of Nuisances.—In earlier times there were, however, certain legal rules which had prepared the way for the coming of legislation expressly intended to set up public health services. Thus at common law the creation of nuisances was unlawful. Such nuisances might be either private, when an occupier of land, who was injuriously interfered with in the enjoyment of his property, might sue the wrongdoer, or public, when the proper remedy was by indictment for the misdemeanour, or, in the case of certain petty offences, proceedings in the court leet.

The generic idea underlying all forms of nuisance is the hurt or inconvenience caused, but the exact ambit of either private or public nuisance is incapable of definition (*a*). Public nuisances are of various kinds, the common factor linking them all together being their tendency to injure the whole of

(*a*) *Bamford v. Turnley* (1862) 3 B. & S. 66; 36 Digest 169, *III*.

the public who come within the area of their operation. Thus the term covers such widely divergent matters as the keeping of disorderly houses, interference with the public right of passage over highways, including interference caused by the dangerous state of premises abutting thereon, offensive trades, and, to quote Blackstone (*b*), "particularly the keeping of hogs in any city or market town." It will be noticed from even this incomplete list that the common element of public inconvenience may operate in many ways and is not confined to injury to the public health (*c*). In so far, however, as the law of nuisances did cover acts injurious to health it may be said to have laid a foundation upon which the later public health legislation of the nineteenth century could rest, and in that legislation an important chapter consists in the provision of additional summary remedies for the abatement of certain types of nuisances and the punishment of offenders at the suit of local authorities (*d*) in place of the more cumbrous procedure provided at common law.

Early Health Legislation.—In addition to the law of nuisances certain statutes passed before the nineteenth century may be said to have supplemented the common law in certain particulars with a view to the promotion of public health. Thus, as early as 1388 a statute (*e*) prohibited and penalised the throwing of dung, filth, garbage, etc., into ditches, rivers or other waters and other places within, about or nigh to any cities, boroughs or towns. In 1531 the Bill of Sewers was passed which empowered the Crown to issue commissions setting up bodies of persons charged with wide powers for effecting land drainage. Incidentally, these commissioners of sewers were charged with the duty of cleansing and purging trenches, sewers and ditches, but their more important task was not directly concerned with public health. However, in some areas, and more especially in the Metropolis, the com-

(*b*) *Commentaries*, Vol. IV, p. 167.

(*c*) *Banbury Urban Sanitary Authority v. Page* (1881) 8 Q.B.D. 97; 36 Digest 156, 5; *A-G. v. Keymer Brick & Tile Co., Ltd.* (1903), 67 J.P. 434; 36 Digest 156, 3.

(*d*) *E.g.*, Public Health Act 1936, §§ 91–100. (*e*) Stat. 12 Ric. 2, c. 13.

missioners of sewers were forced to turn their attention from the rural pursuit of land drainage to the task of providing the rudiments of a system of sanitation for growing urban areas. Again, the coming of the plague to England caused Parliament in 1603 to pass a statute (*f*) containing comprehensive provisions for meeting the emergency.

Legislation before 1835.—In the eighteenth century, as we have already seen (*g*), the growth of urban centres served to show the inefficiency of the municipal corporation in the boroughs and of the parochial organisation elsewhere in the face of the new problems which arose, and resort was frequently had to the expedient of promoting a private Act of Parliament to create bodies of police, paving, street, lamp and improvement commissioners, with the necessary rating powers to enable them to perform their work. Broadly speaking, this process was in operation from 1748 to 1835, when the Municipal Corporations Act reformed the boroughs, and continued in the case of unincorporated towns down to the middle of the nineteenth century until nearly every urban area had its own body of commissioners. The Acts under which they were constituted frequently gave them powers of paving, lighting and cleansing streets, providing watchmen, preventing nuisances by encroachments on highways, removing obstructions, and in some cases of levelling and widening streets and providing a water supply and fire engines. Though their activities would at the present day be regarded as essentially public health services, yet before the thirties of the last century they were regarded rather as police functions, designed to protect the life and property of the inhabitants of their areas.

Problems of Crowded Areas.—That the growth of a population crowded into confined urban areas raised new problems which the older organs and functions of local government were incapable of solving hardly seems to have been recognised before the passing of the Reform Act of 1832. Before that date streets might be paved and cleansed, but

(*f*) Stat. 1 Jac. I, c. 31.

(*g*) Above, p. 23.

rather with a view to make their use convenient than to prevent the spread of disease: buildings were allowed to be put up without any regulation of their situation, materials or accommodation, so long as they did not actually encroach on the public highway: the provision of proper sanitary accommodation or drainage, and even of any system of scavenging except for the streets themselves, was unknown. In 1831 and 1832 the realisation that such a state of affairs could not be permitted to continue without grave danger to the health of the community began to dawn upon the public conscience, for the scare of cholera which occurred in those years caused the setting up by the Privy Council of a Central Board of Health, empowered to issue proclamations and advice on the steps to be taken to prevent the spread of the disease and to set up in urban areas temporary local boards of health to take the necessary emergency measures. This was not, however, sufficient in itself to create a popular demand for public health legislation, and when the temporary fears subsided the measures taken to allay them were allowed to disappear.

Introduction of Public Health Services.—Paradoxical as it may seem, the introduction of public health as a service of local government, though undoubtedly its immediate cause was the recurrent fear of cholera epidemics which threatened the country intermittently between 1831 and 1850, was really rendered possible rather by the desire to keep down the poor rate than by any very strong conviction that public health directly affected the welfare of the general body of citizens. The financial dangers inherent in the old administration of the poor law led to the first reform in local government, and at the same time that boards of guardians were set up in 1834 a system of registration was introduced under their control enabling a body of vital statistics to be produced, upon which arguments in favour of public health could be based. The most important person in the movement, which gradually grew in strength in the years following the Poor Law Amendment Act, was Edwin Chadwick, the Secretary to the Poor

Law Commissioners. With the aid of the statistics then becoming available he produced a report showing the close relation between destitution and insanitary conditions, and from this poor law point of view captured the adherence of the Commissioners, who, in 1838, forwarded his report to the Home Office. In the next year the matter received parliamentary attention and the Poor Law Commissioners were ordered to investigate the sanitary conditions in the country, a task which they completed in 1842. Next a Royal Commission was appointed, which in its Report, issued in 1845, confirmed Chadwick's thesis and recommended that water supply, drainage, and the paving, repairing and cleansing of streets should in each area be performed by only one authority subject to some degree of central administrative control.

Clauses Acts.—This did not lead to the taking of any immediate action, but in the next few years some measures were passed which had the effect of enabling many of the Commission's recommendations to be voluntarily adopted by individual districts. In 1845 and 1847 the enacting of a series of Clauses Acts enabled any town council under the Municipal Corporations Act of 1835, or any body of improvement commissioners, to obtain by local Act uniform powers for the compulsory purchase of land, for setting up markets, gas and water undertakings, for providing cemeteries and for cleansing and paving and improving streets in the urban areas under their control.

Central Department established.—By 1847, then, the provision of public health powers for local authorities had been recognised as desirable only in so far as it would be reflected in the amount of poor law relief provided by the guardians, and the voluntary nature of the powers which might be sought in Improvement Act districts showed that public opinion still regarded the matter as one for the individual decision of each locality. In 1847 and 1848 cholera again came to show that such a half-hearted attempt to deal with a problem vital to the whole community could not suffice, and a further step was

taken and a Central Department was set up, able in some cases to compel the adoption of public health as a local government service. The Public Health Act of 1848 provided for the appointment by the Crown for a period of five years of a General Board of Health, modelled on the Poor Law Commissioners and consisting of three persons, of whom the President was to be a Minister responsible to Parliament. This General Board of Health was given wide powers. It might appoint inspectors who would serve to keep it in touch with the activities of local authorities in the same way that the Poor Law Inspectors acted as the eyes and ears of the Poor Law Commissioners. Moreover, after the holding of a local inquiry, the General Board might procure Orders in Council declaring areas to be local health districts, either on the petition of one-tenth of the ratepayers (not being less than thirty persons), or on the Board's own initiative if the rate of mortality was unduly high. Where these local health districts were co-terminous with municipal boroughs the town councils became the local sanitary authorities under the Act, and in other areas elected local boards of health performed similar duties. Though this Act introduced some measure of compulsion, it did not lead to the mapping out of the whole even of urban England into public health districts, and the next few years were concerned rather with the practical business of superseding improvement commissioners, by amalgamation with town councils and the local boards of health under the Act of 1848, and with theoretical controversies about the desirability of central control, than with the necessity for providing a compulsory system throughout the country.

Public Health Act, 1848.—The Act of 1848 imposed certain compulsory duties, and gave many powers of a sanitary nature to the local boards constituted under its provisions. These related to sewers, drains, wells, water and gas works, the disposal of refuse and the provision of closets and privies, the regulation of slaughterhouses and offensive trades, the prevention of nuisances, the preservation of water supplies

from pollution, the paving and regulation of streets, the control of buildings and common lodging-houses, and the provision of burial and recreation grounds. Local boards were also given powers of rating and of making bye-laws, but in spite of exercising these wide powers they were not expressly incorporated.

The central control exercised by the General Board of Health was again modelled on the poor law: inspection through the Board's inspectors, audit of accounts and a right to veto the dismissal of the inspectors of nuisances, whom local boards were required to appoint, gave a measure of control hitherto unknown in English local government except under the Poor Law Amendment Act of 1834. It was upon this very point that the whole institution of public health nearly foundered. Especially in boroughs, where the town councils had the powers of local boards, the unwelcome and novel interference by a Central Department gave greater weight to the opponents of centralisation, who had already the unpopularity of the administration of the Poor Law Commissioners to point to. As a result the General Board of Health was allowed to dissolve on the termination of the five years for which its members had been appointed, and between 1854 and 1858 the new members were appointed, and indeed the very existence of the Board itself was kept alive, on only an annual basis.

Local Government Act, 1858.—In 1858 the next great legislative landmark was set up. The Local Government Act of that year removed the compulsive powers of the General Board of Health and divided what was so left of its supervision between the Home Office and the Privy Council. Henceforth the creation of local boards of health was to rest upon a purely voluntary basis, and always to be the result of a prior resolution of the ratepayers of the area. In addition, some of the powers conferred by the Public Health Act of 1848 were modified, while the sanitary provisions of the Clauses Acts were incorporated and so made available to the inhabitants of any area without the expense of a local Act.

Rural Areas.—So far the sanitary code contained in the Public Health Act, 1848, and the Local Government Act, 1858, was primarily concerned to deal with urban areas, and in fact had only been applied in such areas, but no express provision of law yet prevented a purely rural area from constituting itself a "local government district" under the latter Act. In 1862 the Highway Act empowered quarter sessions compulsorily to combine parishes into "highway districts" under highway boards, but the essentially rural nature of these new authorities was emphasised by a provision excluding local government districts from the scope of the Act. Hence, to avoid compulsory amalgamation into highway districts, many purely rural parishes hastened to adopt the Local Government Act of 1858 and became in consequence governed by "urban sanitary authorities." To stop this process from going further the Local Government Act Amendment Act, 1863, prevented for the future the adoption of the Act of 1858 in places with less than three thousand inhabitants. The result was that sanitary powers were administered in "urban" areas either by borough councils, improvement commissioners or local boards of health.

It must not be thought, however, that public health powers were entirely lacking in rural areas. Outside towns the problems of sanitation are not, from the scattered nature of the population, so acute, but some powers had in fact already been given. The Nuisances Removal Acts, 1846 to 1866, which were designed to simplify the procedure for the abatement and prosecution of nuisances, applied equally in rural and urban districts, and in the former were administered by the boards of guardians. Moreover, parochial vestries had received some minor powers of a sanitary nature.

Royal Sanitary Commission.—All these changes in the law and the bodies administering it had served to make familiar the notion of public health as a local government service, and the many problems it had raised which still waited solution led to the appointment in 1868 of a Royal Commission. The

Report of this body, issued in 1871, emphasised the unsatisfactory state of the whole subject caused by the permissive character of the provisions of the sanitary code, the lack of adequate inspection, the friction caused by the existence of so many *ad hoc* authorities, and the absence of a strong system of central control. Reforms on the lines it advocated came soon. In 1871 the Local Government Board was created (*h*) to concentrate in its hands the scattered powers of central control. In 1872 was passed the Public Health Act, which was added to by the Sanitary Law Amendment Act, 1874. Both these Acts, together with all the other Acts on the subject still in force, were repealed and consolidated by the great Public Health Act of 1875, which formed the foundation of all future public health legislation, and was, with various amending Acts, to a large extent superseded by the Public Health Act, 1936.

Public Health Acts, 1872 and 1875.—The Acts of 1872 and 1875 mapped out the whole of England into sanitary districts, so that public health became for the first time a service administered over the entire country. But as the problems of sanitation are very different in the towns and in the country districts, these sanitary districts were divided into urban and rural, in the former of which wider powers were exercisable. Urban sanitary districts consisted of boroughs, Improvement Act districts and local government districts, and the sanitary authorities were respectively the borough councils, improvement commissioners and the local boards. Rural sanitary districts were constituted out of the rural parts of unions, and were to be administered by the boards of guardians acting as rural sanitary authorities, to whom the sanitary powers of vestries were transferred (*i*).

In 1894, as we have already seen (*j*), the urban sanitary authorities, other than borough councils, became urban district councils governing urban districts, while the guardians

(*h*) Now, since 1919, the Ministry of Health.

(*i*) Public Health Act, 1875, §§ 5-19.

(*j*) See above, p. 32.

ceased to be sanitary authorities and separate rural district councils became the general local authorities for rural districts.

Another class of authority, which has come to have important public health functions, was constituted by the Local Government Act of 1888 when it created county councils : so that now we have to take into account as public health authorities primarily borough councils, and urban and rural district councils, while in some matters county councils, parish councils and even parish meetings have duties of a public health nature.

Public Health Powers.—Numerous amending Acts varied and amplified the powers and duties of local authorities under the Public Health Act, 1875, but did not depart from its basic principle of the establishment of uniform health services throughout the country, less comprehensive in rural than in urban areas, but with provision that a rural authority might be clothed with powers, otherwise restricted to urban authorities, whenever that course was justified by change of local circumstances (*k*).

The principal amending Acts, which were in whole or in part adoptive, were passed in 1890, 1907 and 1925 (*l*) and remained in force till 1937. A feature they had in common was that their provisions were largely taken from private Acts obtained by individual local authorities, which, having proved to be of effective service locally, were thought worthy of being made available, or had become necessary for general application. Indeed, it is impossible to set any limit to future extensions of the public health services. The varying needs of residents in congested urban areas and of scattered communities or groups in rural districts, the changes of habits arising from improved and cheapened travelling facilities and the practical application of developments in scientific knowledge, the more widespread understanding of the laws of health and the rising standard of living in all classes of our population except possibly the poorest

(*k*) Public Health Act, 1875, § 276 ; Local Government Act, 1933, § 272.

(*l*) Public Health Acts Amendment Act, 1890 ; Public Health Acts Amendment Act, 1907 ; and Public Health Act, 1925.

—all lead to a heightened sense of the value and urgency of communal action in regard to public health. This process of extension has been in operation ever since the passing of the Act of 1875, and shows no sign of becoming exhausted.

Public Health Act, 1936.—A large part of the mass of public health legislation was consolidated and amended by the Public Health Act, 1936. This Act, to quote the words of the Committee which drafted it, was designed to cover

“the provisions of a strictly public health character relating to the prevention and treatment of disease, that is, as regards environment, to such matters as drains and sewers, buildings, water supply and the abatement of nuisances, and as regards personal hygiene to such matters as the provision of hospitals, maternity centres, etc.” (*m*).

The Public Health (London) Act, 1936, dealt similarly with the health legislation of the Metropolis, while the other parts of the public health code were left outstanding for future consolidation. Though primarily a consolidating measure, the Public Health Act, 1936, also effected numerous amendments in the law. Many points of detail and some of substance, where experience had proved the previous legislation to be unsatisfactory, were amended. Thus the provisions in the Act taken from the earlier amending Statutes of 1890, 1907, and 1925 are made of general application, at any rate in urban areas, and no longer depend upon adoption by the local authority minded to put them into force. Once again the opportunity was taken to modernise the law through the familiar process of incorporating into the general law a number of provisions which had become common-form in local Acts.

Administration.—The Public Health Act, 1936, recognises that in certain matters county councils and even parish councils have public health functions, but it follows the basis of administration derived from the Public Health Act of 1875, and provides in general that borough and urban district councils on

(*m*) Second Interim Report of the Local Government and Public Health Consolidation Committee. (Cmd. 5059/1936, p. 9.)

the one hand and rural district councils on the other are pre-eminently public health authorities, being classed as "urban" and "rural" authorities respectively (*n*). This latter distinction is not, at any rate within the matters dealt with by the Act of 1936, so marked as in former times. The effect of motor transport in making possible building development in the countryside has in many cases robbed of its force the argument that rural authorities had less acute resultant problems to face than their urban neighbours. Accordingly, powers and duties are by the Act of 1936 uniformly conferred on both urban and rural authorities, with slight exceptions (*o*). And even here the Minister may by order invest a rural authority with any of these peculiarly urban powers (*p*). Under the Public Health Act, 1936, county councils have powers and duties relating to cleansing (*q*), public conveniences (*r*), tuberculosis (*s*), the prevention and treatment of blindness (*t*), subscribing to associations providing nurses (*u*), health propaganda (*v*), hospitals (*w*), nursing homes (*x*), laboratories and ambulances (*y*), and notification of births, maternity and child welfare and child life protection (*z*). Parish councils have powers and duties relating to water supply (*a*), mortuaries and post-mortem rooms (*b*), baths, bathing places and wash-houses (*c*), and offensive ponds etc. (*d*). Elasticity in administration may be obtained in a variety of ways. Two or more councils may combine for the purpose of any of their functions under the Act (*e*). The Minister may by order create united districts for any public health function governed by incorporated joint boards composed of representatives of the constituent local authorities and of county councils, each contributing to the expenses of the joint board (*f*). Another useful provision enables the Minister to set up by consent of the authorities concerned joint boards representative of county and county

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| (<i>n</i>) § 1. | (<i>o</i>) These are §§ 11, 41, 46, 79, 80, 107, 108, 263 and 264. |
| (<i>p</i>) § 13. | (<i>q</i>) §§ 85 and 86. |
| (<i>s</i>) §§ 171-174. | (<i>r</i>) § 87. |
| (<i>v</i>) § 179. | (<i>t</i>) § 176. |
| (<i>y</i>) §§ 196 and 197. | (<i>w</i>) §§ 181-186. |
| (<i>b</i>) § 198. | (<i>x</i>) §§ 187-194 |
| (<i>e</i>) § 272. | (<i>z</i>) Part VII, §§ 200-220. |
| | (<i>a</i>) § 125. |
| | (<i>c</i>) § 230. |
| | (<i>f</i>) §§ 6, 7, 9, 10. |

borough councils for the discharge of any of their functions under the Act (*g*). Lastly, the Minister may by order (provisional only in the case of opposition arising) set up "port health authorities" having jurisdiction over both the port in question and its waters, and constituted either of one local authority or of a joint board representing local authorities and the harbour authority (*h*).

Finance.—In the sphere of finance powers exist for throwing the expenses of activities benefiting a part only of an area upon that part. Differential rating of this sort may be achieved by an urban authority dividing its district into parts for any purpose of the Act of 1936, while a rural authority may with the consent of the Minister constitute "special purpose areas" for works of sewerage, sewage disposal or water supply or other works normally chargeable to a special rate (*i*).

Conversely, to widen the area of charge rural authorities may under the general law contribute from the general rate, and so spread over the whole of their district, expenses which would normally be chargeable to the special rate (*j*). Again, to widen still further the area of charge county councils may contribute to the expenses of an urban or rural authority in connection with hospital accommodation, sewers or sewage disposal works or water supply (*k*). Again, the council of a county district may by agreement relinquish or transfer to the county council any of its functions under the Act on such terms as may be agreed. Such agreements, except where they are expressed to be for a fixed period not exceeding five years, are terminable by twelve months' notice (*l*).

Default Powers.—Default powers are conferred on the Minister. If after a local inquiry the Minister is satisfied that

(*g*) § 8.

(*h*) §§ 2-5, 9 and 10.

(*i*) § 12; as to special expenses, see § 308, also Local Government Act, 1933, § 190 (3) and above, p. 167. By the Rural Water Supplies and Sewerage Act, 1944, § 6, however, expenses incurred for works of sewerage, sewage disposal or water supply must in future be charged as general expenses.

(*j*) Local Government Act, 1933, § 190 (4); Public Health Act, 1936, § 308 (1).

(*k*) § 307.

(*l*) § 320.

a council has failed to discharge any of its functions under the Act, he may make an order declaring it to be in default and directing it to remedy the default. If this order is not obeyed, it is enforceable by order of *mandamus*, or the Minister may make an order transferring the functions, in the case of the council of a county district, to the county council, and, in other cases, to himself (*m*).

Scope of Powers.—It is impossible here to set out all or even many of the powers and duties included in the Public Health Acts. All that can be done is to indicate generally their scope and variety.

The primary purpose of public health legislation is the promotion of the general health of the community as a whole, and fundamentally this is viewed in the Acts as a problem of prevention. But with the passage of time the scope of preventive medicine has been enlarged and legislation has expanded the powers of local authorities. At first the Public Health Acts were concerned almost exclusively with what may be called sanitary matters—the prevention of nuisances and the spread of infectious diseases, the provision of adequate drainage and the control of buildings. But because the earlier Acts were passed at a time when anything like a modern system of local government was in its infancy, they also contained powers permitting local authorities to provide certain amenities, such as parks and pleasure grounds, which have later been seen to be essential to the promotion of a healthy people. From these beginnings the legislation has extended into the field of medical services, and even branched out so as to provide for the care of certain classes of the community, such as the blind, who through some personal incapacity are limited in their opportunities.

Nuisances.—Historically the sections of the Public Health Act, 1936, relating to nuisances (*n*) derive from two separate codes, the one contained in the Nuisances Removal Acts, and the other in the first Public Health Act of 1848, which became

(*m*) §§ 322-325.

(*n*) §§ 91-106.

fused together in the Public Health Act of 1875. The advantages of these provisions are that summary proceedings may be taken in place of the expense of a High Court action or prosecution on indictment, that the definition of the acts amounting to nuisances is clearly laid down and that the local authority is in a position not only to vindicate the rights of persons affected, but also to maintain a constant watch for new nuisances occurring.

In the first place, it is the duty of every local authority to cause its district to be inspected from time to time for the detection of statutory nuisances (*o*). Secondly, these statutory nuisances are defined by the Act (*p*). To secure the abatement of statutory nuisances found to exist, the local authority must first serve an "abatement notice" upon the person responsible, requiring him to abate the nuisance. On default, proceedings are to be brought in a court of summary jurisdiction which may make a "nuisance order" requiring the abatement of the nuisance and the execution of any necessary works and prohibiting the recurrence of the nuisance. An appeal against a nuisance order lies to quarter sessions (*q*).

Failure to obey a nuisance order not only subjects the person in default to a fine and a recurring daily penalty, but entitles the local authority to perform the work and recover the cost from him (*r*).

Offensive Trades.—Trades of an offensive character may not, without the consent in writing of the urban authority, be established within its district. The list of such trades is set out in the Act, and the local authority may, by order confirmed by the Minister, declare any other trade, business or manufacture to be an offensive trade in its district (*s*). Urban authorities may make bye-laws for regulating offensive trades (*t*).

(*o*) § 91.

(*p*) §§ 92, 101, 109, 110, 141, 259, 267, 268; see too Quarry (Fencing) Act, 1887.

(*q*) §§ 94 and 301.

(*r*) §§ 95 and 96; as to smoke nuisances, see §§ 102 and 103.

(*s*) § 107.

(*t*) § 108.

Food and Drugs.—The legislation relating to food and drugs is directed to two main objects which, though distinct in theory, tend to overlap in practice. These objects are the protection of purchasers, on the one hand, from harmful substances, and on the other from fraud or deception. The Local Government and Public Health Consolidation Committee in its Third Interim Report (*u*) reviewed some twenty-nine different statutes bearing on these matters. The Food and Drugs Act, 1938, was based on this report and, in addition to consolidating the previous law, which was contained in the Public Health Act, 1875, the Food and Drugs (Adulteration) Act, 1928, and other Acts, imposed additional duties upon local authorities. Certain functions with regard to the supervision of the production of milk are to be transferred to the Minister of Agriculture and Fisheries upon a date not yet appointed, under the Food and Drugs (Milk and Dairies) Act, 1944.

Unwholesome Food.—Sections 9 and 10 of the Food and Drugs Act, 1938, enable an authorised officer of a local authority to examine any food intended for human consumption which has been sold, or is offered or exposed for sale, or in the possession of any person for the purpose of sale or preparation for sale, and, if it appears to him to be unfit for human consumption, he may seize and remove it in order to have it dealt with by a justice of the peace, who may condemn it. The person to whom the article belonged or in whose possession or on whose premises it was, is liable to a penalty or even imprisonment, and the onus of showing that the article was not exposed or deposited for sale or preparation for sale or was not intended for the food of man lies on the defence (*v*).

Adulteration.—The adulteration of food, generally, is now dealt with in the Food and Drugs Act, 1938, §§ 1–8. The Act also contains a number of provisions applying only to certain special articles. In the first place, no person may add

(*u*) Cmd. 5628/1937.

(*v*) See also *Cant v. Harley & Sons, Ltd.* [1938] 2 All E.R. 768, where it was held (*per* Du Parcq, J.) that if the magistrates believe the defendants' evidence, the defence is proved, but if they are in doubt, it is not proved.

any substance to any food (*w*) or any drug, so as to render it, if food, injurious to health, or so as to affect injuriously its quality or potency, if a drug ; nor may any person sell any such food or drug (*x*). Secondly, no person may abstract from any food any constituent of it so as to affect injuriously the nature, substance or quality of the food with intent that it be sold in its altered state, without notice to the purchaser of the alteration, or if in that state the food does not comply with any regulations under the Act prescribing the composition of food (*y*). Thirdly, no person may sell to the prejudice of the purchaser any food or drug which is not of the nature or substance or quality of the article demanded by the purchaser (*a*). Penalties, and in the case of recurring offences, imprisonment may be awarded for breach of these provisions (*b*). Proceedings may be taken by a private prosecutor, but the Act makes provision for its execution by local authorities.

This is the task of "food and drugs authorities." In London these are the Common Council of the City and the metropolitan borough councils. Outside London, they are county borough councils, the councils of boroughs and urban districts with a population of 40,000 according to the last published census for the time being, and elsewhere the county councils (*c*).

Food and drugs authorities must appoint public analysts with the approval of the Minister of Health, and they may only remove the analyst from office with the consent of the Minister (*d*). Powers of sampling are conferred on the officers of the authorities, and unsatisfactory samples must be submitted for analysis to the public analyst (*e*). The analyst's

(*w*) "Food" includes drink. Food and Drugs Act, 1938, § 100.

(*x*) Food and Drugs Act, 1938, § 1.

(*y*) *Ibid.*, § 2.

(*a*) *Ibid.*, § 3.

(*b*) *Ibid.*, § 79.

(*c*) *Ibid.*, § 64. The Minister is empowered to extend the functions to other urban authorities with populations of 20,000, and on the other hand he may direct that an authority, which before the Act was not a food and drugs authority, shall not become one, where the administration of the Act by the county council would otherwise be rendered inconvenient.

(*d*) Food and Drugs Act, 1938, § 66.

(*e*) *Ibid.*, § 68. A private purchaser may also have any article of food or of a drug analysed on payment of a statutory fee.

certificate is sufficient evidence in legal proceedings under the Act of the facts stated therein unless the other party requires the analyst to be called as a witness (*f*). Certain special defences are open to a defendant prosecuted for an offence under the Act. In general, subject to certain conditions as to notice, etc., it is a defence to prove that :

- (i) he purchased the article as the same in nature, substance and quality as that demanded of him by the person to whom he sold it, and
- (ii) with a written warranty to that effect, and
- (iii) that he had no reason to believe, at the time he sold it, that it was otherwise, and
- (iv) that he sold it in the same state as when he purchased it (*g*).

During the war many orders providing for the adoption of certain standards and for the labelling of various foods were made under Defence Regulations by the Minister of Food. It may be that some of these will ultimately become of permanent effect.

Regulation of certain types of Dwellings.—Certain other evils are subject to the preventive provisions of the Public Health Act, 1936. Common lodging houses, in which the poorest find shelter, are required to be registered with the local authority and must be conducted in accordance with bye-laws made by the authority for fixing the number of lodgers and for promoting cleanliness and ventilation (*h*). Somewhat similar provisions require the registration of canal boats used as dwellings and subject them to the inspection of local authorities for the purpose of seeing to due compliance with regulations made by the Minister of Health (*i*).

Powers applicable to tents, vans, sheds and moveable dwellings are also given by the Public Health Act, 1936. Such structures, if prejudicial to the health of their inmates or causing a nuisance, may be dealt with as statutory nuisances, and may be made the subject of bye-laws made by the local authority (*j*). Moreover, the use of land as a camping site or the keeping of a moveable dwelling on one site for more than

(*f*) Food and Drugs Act, 1938, § 81.

(*g*) *Ibid.*, § 84.

(*h*) Public Health Act, 1936, §§ 235-248.

(*i*) §§ 249-258. (*j*) § 268.

forty-two consecutive days or sixty days in any consecutive twelve months is prohibited except under licence of the local authority. But the Minister of Health may grant to camping organisations certificates of exemption relieving them and their members from the necessity of a licence (*k*).

Building Bye-laws.—The proper regulation of the construction of buildings, from the point of view both of the creation of healthy surroundings and of the prevention of danger through structural defects or risks of fire, has for long been a subject of public health legislation. Powers for these purposes were contained in §§ 157 to 159 of the Public Health Act, 1875. Those sections gave wide powers to urban authorities to regulate the construction of new streets (*l*) and new buildings. The powers were to be exercised by the urban authority making bye-laws as to the construction of new buildings and providing for the giving of notices, the deposit of plans, inspection by the local authority, and the alteration or pulling down of any work done in contravention of the bye-laws. These provisions were, however, limited in operation and extent, and their defects were gradually remedied by the later adoptive Public Health Acts. First, the range of matters which might be brought within the ambit of building bye-laws was extended (*m*). Secondly, the power to make building bye-laws was extended to rural authorities (*n*). Thirdly, the operations which were to be deemed to be the erection of a new building were re-defined, so as to bring many forms of alteration within the scope of the bye-laws (*o*). Fourthly, the bye-laws were permitted to be extended in certain matters to apply to old buildings erected before the date on which the bye-laws came into force (*p*). Lastly, bye-laws might be made so as to prevent buildings from being altered in such a manner that, if at first

(*k*) § 269.

(*l*) As to streets, see below, p. 596.

(*m*) Public Health Acts Amendment Act, 1890, § 23; Public Health Acts Amendment Act, 1907, § 24.

(*n*) Public Health Acts Amendment Act, 1890, § 23.

(*o*) Public Health Acts Amendment Act, 1907, § 23.

(*p*) Public Health Acts Amendment Act, 1890, § 23.

so constructed, they would have contravened the building bye-laws (q).

These powers enabling local authorities to control not only the structure of buildings from the point of view of safety and health, but also to see that they were provided with the minimum of sanitary requirements, have been replaced by the somewhat extended and altered provisions of the Public Health Act, 1936. In the first place, the power to make building bye-laws is directly conferred on both urban and rural authorities ; but this is no longer left as a mere optional power, for a local authority may be required by the Minister to make building bye-laws, and this is reinforced by a provision enabling the Minister to make bye-laws in default (r). Moreover, bye-laws are no longer to be allowed to grow out of date. Bye-laws made before the Act cease to have effect after three years from its passing, while, when a local authority has once made bye-laws under the Act, they only continue in force for a period of ten years (s). Moreover, the Minister may revoke unreasonable bye-laws (t). The building bye-laws may regulate all or any of the following matters :

“ (i) as regards buildings—

- (a) the construction of buildings, and the materials to be used in the construction of buildings ;
- (b) the space about buildings, the lighting and ventilation of buildings, and the dimensions of rooms intended for human habitation ;
- (c) the height of buildings ; the height of chimneys, not being separate buildings, above the roof of the building of which they form part ;

(ii) as regards works and fittings—

- (d) sanitary conveniences in connection with buildings ; the drainage of buildings, including the means of conveying refuse water and water from roofs and from yards appurtenant to buildings ; cesspools and other means for the reception or disposal of foul matter in connection with buildings ;

(q) Public Health Acts Amendment Act, 1907, § 23.

(r) Public Health Act, 1936, §§ 61 and 69.

(s) § 68.

(t) § 69.

- (e) ashpits in connection with buildings ;
- (f) wells, tanks and cisterns for the supply of water for consumption in connection with buildings ;
- (g) stoves and other fittings in buildings (not being electric stoves or fittings), in so far as bye-laws with respect to such matters are required for the purposes of health and the prevention of fire ;
- (h) private sewers ; communications between drains and sewers and between sewers " (u).

The bye-laws may also provide for giving notices, depositing plans, and the inspection of work (v).

The erection of a new building for the purpose of the bye-laws includes :

- "(i) the re-erection of any building or part of a building when an outer wall of that building or, as the case may be, that part of a building has been pulled down, or burnt down, to within ten feet of the surface of the ground adjoining the lowest storey of the building or of that part of the building ;
- (ii) the re-erection of any frame building or part of a frame building when that building or part of a building has been so far pulled down, or burnt down, as to leave only the framework of the lowest storey of the building or of that part of the building ;
- (iii) the roofing over of any open space between walls or buildings " (w).

Bye-laws in so far as they relate to buildings may also be made applicable in the case of structural alterations or extensions of or certain changes of use of existing buildings (x).

Within one month after their deposit under the building bye-laws plans must be passed or rejected by the local authority and notice of the decision must be given to the depositor (y). The local authority is not, however, left at liberty to pass or reject plans at its discretion. Its duty is to pass the plans unless one or more of a number of specified reasons exist. Thus it must reject the plans if they are :

(u) § 61. (v) § 61. (w) § 90. (x) § 62.
(y) § 64 ; exceptionally the bye-laws may extend this period to five weeks where meetings are only held monthly.

- (a) defective, or
- (b) show that the proposed work would contravene the bye-laws, or
- (c) if the local authority's requirements in certain particulars are not complied with (z).

Disputes may be determined by a court of summary jurisdiction, or, in certain cases by consent, by the Minister (a). In general the local authority has therefore little of discretion to exercise in the passing or rejection of plans, and until the Public Health Act, 1936, it had no power to allow relaxation of bye-laws in any particular case. However a new provision enables the local authority with the consent of the Minister to relax or dispense with the requirements of the bye-laws in any case where it would be unreasonable to insist on their observance (b). Again, another useful new provision applies in the case of buildings constructed of materials unsuitable for a permanent structure, either because of their liability to rapid deterioration or otherwise. In such cases the local authority may pass the plans and fix a period on the expiration of which the building must be removed and may impose reasonable conditions with regard to its user (c).

Other powers in relation to buildings are conferred on local authorities by the Public Health Act, 1936. Local authorities are given power after due notice to require the alteration or removal of new buildings contravening the bye-laws or erected without complying with the requirements as to deposit of plans (d). Again, powers to deal with dangerous or dilapidated buildings or structures are given to local authorities (e).

Sanitation.—An important branch of public health legislation has arisen from the aggregation of population in

(z) § 64. The cases in which the local authority must reject the plans for non-compliance with its requirements are contained in §§ 25 (building over sewers), 37 (provision of satisfactory drainage), 43 (provision of satisfactory closet accommodation), 52 (materials liable to rapid deterioration or unsuitable for permanent buildings), 54 (building on ground filled up with offensive material), 55 (access for removal of refuse), 59 (exits and entrances to public and certain other buildings).

(a) §§ 64 and 67.

(b) § 63.

(c) § 53; the period may on application be extended.

(d) § 65.

(e) § 58.

urban areas. The disposal of sewage matter is beyond the possibility of action on the part of every individual householder. Houses must be drained into drains and sewers and the drainage matter conveyed to some place where it may be deposited and, according to modern usage, treated.

Generally there lies on the local authority the duty of providing sewers and disposal works for the treatment and disposal of sewage, these being obviously matters which can only effectively be executed by and at the cost of the community, while the individual householder or landowner is required to be at the cost of providing drains or pipes to carry the sewage matter from his premises to the sewerage system of the authority. To effect this general purpose the Public Health Act, 1875, vested all sewers (*f*) in the local authority and imposed an obligation on the local authority to keep such sewers in repair (*g*). On the other hand, the drains, by which each individual house is connected with the sewers, remained in private ownership and each landowner's liability to repair his drains might be enforced by the local authority in a summary manner (*h*). This difference in the treatment of sewers and drains obviously involved definitions of those two types of pipe.

Definitions of "Drains" and "Sewers."—Briefly, the definitions in the Public Health Act, 1875, of "drains" and "sewers" were that a pipe serving merely to carry the drainage of one building only to a cesspool or sewer was a "drain," while all other drainage pipes were "sewers" (*i*). Accordingly, when a local authority took proceedings under § 41 of that Act to compel the owner or occupier of premises to carry out his duty to repair what in ordinary speech would be called a drain, the proceedings were bound to fail if it could be shown that the pipe in question connected to more than one house, since in such a case the pipe was technically a "sewer" and was vested

(*f*) Except those made for private profit, for the drainage of land or under the authority of commissioners appointed by the Crown.

(*g*) Public Health Act, 1875, §§ 13 and 15.

(*h*) *Ibid.*, § 41.

(*i*) *Ibid.*, § 4.

in the local authority on whom rested the liability to repair (*j*). In other words, as was once said of the then state of the law,

“ Once you get the drainage of two buildings, whether occupied by the same or by different persons, into a drain, it becomes a sewer repairable by the local authority, though it is on private land, and though no one else can drain into it without the authority of the owner of the land ” (*k*).

To amend what was so patently an unfair state of the law, § 19 of the Public Health Acts Amendment Act, 1890 (an adoptive Act), provided that where two or more houses belonging to different owners were connected with a public sewer by a “ single private drain ” the local authority could compel repair at the cost of the owner. Not only was this amendment inelegant in that it applied only in areas where the Act of 1890 had been adopted, and did not alter the definition of sewer but merely provided that those sewers which were “ single private drains ” should be privately repairable, but also it was interpreted by the Courts as only applying where the houses belonged to different owners and the drain was originally constructed in pursuance of a requirement of the local authority made under § 23 or § 25 of the Act of 1875 (*l*). This confused state of the law led to many attempts to evade it. Local Acts frequently contained provisions dealing with the matter, and in one way or another local authorities sought by “ combined drainage agreements ” to impose the burden of repair on owners wishing to connect several buildings with one drain pipe.

The Present Law.—The opportunity for a thorough reform of the law came with the Public Health Act, 1936. The definitions of “ drains ” and “ sewers ” remain as they were in the Act of 1875 (*m*), but the law as to the vesting of sewers in local authorities and the liability for their repair are greatly altered for

(*j*) *Acton Local Board v. Batten* (1884) 28 Ch.D. 283 ; 41 Digest 5, 16.

(*k*) *Per Scrutton, L.J.*, in *Hill v. Aldershot Corporation* [1933] 1 K.B. 259, p. 266 ; Digest Supp.

(*l*) *Wood Green Urban District Council v. Joseph* [1908] A.C. 419 ; 41 Digest 3, 9 ; *Hill v. Aldershot Corporation* [1933] 1 K.B. 259 ; Digest Supp.

(*m*) Public Health Act, 1936, § 343.

the future. As to sewers completed before the commencement of the Act (*n*) the *status quo* is largely preserved. This end is achieved by adding a new term of art, that of "public sewer," which covers sewers vested in the local authority (*o*), and the liability for the maintenance of which is imposed on the local authority. In addition to sewers constructed at the expense of the local authority or acquired by it, public sewers include all sewers which under the Act of 1875 were vested in the local authority or would have been so vested but for some provision relating to combined drainage. But in some of these cases the local authority may recover the maintenance expenses from the owners of the premises served. This may be done in the case of public sewers which before the Act of 1936 came into force were under provisions relating to combined drainage not repairable by the local authority, or where the sewer was not constructed by the local authority and lies in private property served by it or in a roadway (not being a highway repairable by the inhabitants at large) which is used solely or mainly as a means of access to the premises connected to the sewer. Disputes between the owners and the local authority are to be determined by a court of summary jurisdiction (*p*). By these provisions the law is preserved in force much as it formerly stood in respect of sewers constructed before the Public Health Act of 1936 came into operation.

New Sewers.—In the case of sewers constructed after the commencement of the Act of 1936 the law is profoundly changed. Sewers constructed at the expense of the local authority or acquired by it, and sewers constructed under private streets works legislation (*q*) vest as public sewers in the local authority (*r*), but sewers constructed by private persons are "private sewers" and, as in the case of drains, the local authority may take steps to compel their repair by or at the expense of their owners (*s*). A developer of land constructing a sewer can, in other words, no longer throw the cost of its

(*n*) October 1, 1937, § 347.

(*q*) See below, p. 597.

(*o*) § 20.

(*r*) § 20.

(*p*) § 24.

(*s*) § 39.

maintenance on the local authority merely because it drains two or more buildings. But new provisions enable the local authority by means of a declaration of vesting to "adopt" a "private sewer," and so vest it in itself as a "public sewer" (*t*), and even to agree beforehand to adopt a sewer in the future (*u*).

When the local authority proposes to make a declaration vesting a private sewer in itself, notice must be given to the owner, who may appeal to the Minister of Health. Conversely, the owner of a private sewer may apply to the local authority for a declaration of vesting, and on refusal may appeal to the Minister. When such a declaration is made the sewer becomes a public sewer and thenceforth is maintainable by the local authority (*v*).

Drainage Powers.—It is the duty of local authorities to provide such public sewers as may be necessary for draining their districts and to make the necessary provision for disposing of their contents (*w*), while the county council may contribute towards the expenses of the council of a county district in connection with sewers or sewage disposal works (*x*). To enable the councils to carry out this general duty they have powers of constructing public sewers in streets and, subject to reasonable notice and the payment of compensation (*y*), on any land. They may acquire by agreement sewers or sewage disposal works and may construct sewage disposal works (*z*). If they desire to construct any public sewer or sewage disposal works outside their districts they must first give twenty-eight days' notice by advertisement and by service on the local authority affected, and in the event of opposition the Minister must hold a local inquiry and confirm the proposal before the work can commence. But this procedure does not apply if the only work to be executed is the placing of a public sewer in a highway repairable by the inhabitants at large and the local authority affected consents (*a*). Local authorities may alter

(*t*) § 17.

(*w*) § 14.

(*z*) §§ 15 and 90.

(*u*) § 18.

(*x*) § 307.

(*a*) § 16.

(*v*) §§ 17, 20 and 21.

(*y*) §§ 15 and 278.

or discontinue the use of any public sewer, but only on providing for any person deprived of its use an equally effective substitute (*b*). Agreements may be made between local authorities, with the approval of the Minister, for the interconnection of sewers (*c*). It is the duty of local authorities to maintain, cleanse and empty all public sewers vested in them (*d*). They must not discharge foul water into water-courses until it has been purified (*e*), and they must commit no nuisance in the discharge of their sewerage functions (*f*).

Connection to Sewers.—Subject to certain limitations the owner or occupier of any premises or the owner of a private sewer has the right to connect and discharge into a public sewer vested in the local authority (*g*) and this equally applies to a person outside its district, subject to reasonable payment for so doing (*h*). The local authority may, however, insist on making the connection itself at the cost of the person desiring the facility of discharging into the public sewer (*i*). Moreover, the local authority may require new buildings or existing buildings whose drainage is unsatisfactory to be drained into a sewer where the sewer is not more than one hundred feet from the site of the building and difficulties arising from levels and the right to use the sewer or to cross intervening land do not arise (*j*). Even if the distance exceeds one hundred feet the local authority may require connection to a sewer if it undertakes to pay the extra cost (*k*).

Trade Effluents.—The right or duty to connect directly or indirectly with a public sewer is, however, subject to limitations. No person may pass into a sewer any matter likely to injure or block it or interfere with the sewage treatment, nor chemical refuse or waste steam or liquids so heated as to cause danger or a nuisance or be prejudicial to health, nor any petroleum spirit or carbide of calcium (*l*).

In general a local authority must give facilities to manu-

(*b*) § 22.

(*f*) § 31.

(*j*) §§ 37, 39 and 90.

(*c*) § 28.

(*g*) § 34.

(*k*) § 37.

(*d*) § 23.

(*h*) § 35.

(*l*) § 27.

(*e*) § 30.

(*i*) § 36.

facturers for discharging liquids from trade processes into its sewers ; but this duty if unqualified might lead to inconvenience arising from the quantity or nature of trade effluents. Accordingly the Public Health (Drainage of Trade Premises) Act, 1937, imposes limitations on the right to discharge trade effluents into the sewers. In the first place, local authorities may make " trade effluent bye-laws " regulating the times of discharge, the character of permitted effluents and prescribing charges for their reception, and they may enter into agreements for disposal of trade effluents. The restrictions on passing deleterious substances into the sewers are, with the exception of those applying to petroleum and carbide of calcium, replaced by the provisions of the bye-laws. Secondly, in general there is no absolute right to pass trade effluents into the sewers without the local authority's consent ; but neither the local authority's consent nor the restrictions imposed by the Act apply to the continuation of a pre-existing discharge, not increased in amount or varied in character. Again, though the restrictions of the Act apply, there is no requirement of the local authority's consent in the case of a discharge of liquid from laundering or of an effluent for which consent is dispensed with under the bye-laws. In other cases the local authority's consent is required and this may be given subject to conditions, though there is a right of appeal to the Minister. In all cases, however, in which the restrictions of the Act apply, and whether or not consent is required, a manufacturer must serve a " trade effluent notice " on the local authority two months before he desires to commence discharge into the sewers. The local authority may then, subject to an appeal to the Minister, require him to defer commencing the discharge until a later specified date.

Obligation to provide Sanitation.—The obligation to maintain drains and private sewers lies upon the owner, and the local authority may compel the proper performance of this duty (*m*). Moreover, in the construction of drains or sewers by

private persons the local authority may insist upon alterations in material, size or direction to enable the proposed drain or sewer to form part of the general sewage system, itself bearing the extra cost involved (*n*). The local authority may also require new buildings to be provided with a proper system of drainage (*o*) and with adequate water- or earth-closet accommodation (*p*).

The liability of providing and maintaining proper sanitary accommodation which rests on the owner of the premises can be enforced by the local authority (*q*).

Cleansing.—Duties in relation to scavenging and the cleansing of streets are also imposed on local authorities, which may, and when required by the Minister must, remove house refuse and cleanse earth-closets, privies, ashpits and cesspools for the whole or part of their districts and may make bye-laws in connection therewith (*r*). They may also require the owner or occupier of premises to provide regulation dustbins, or they may themselves provide and maintain dustbins, making an annual charge not exceeding 2*s.* 6*d.* therefor (*s*).

A local authority may also undertake the removal of trade refuse at reasonable charges (*t*), and may charge for cleansing earth-closets, privies, ashpits and cesspools where the service required in a particular case exceeds that owing under their general duty (*u*).

A local authority may, and if required by the Minister must, undertake the cleansing, and may at its discretion also undertake the watering of streets. If the local authority is not also the highway authority the latter must contribute, or may itself arrange to undertake the work (*v*).

A local authority may require the owner or occupier of a house, which is in such a filthy or unwholesome condition as to be prejudicial to health or is verminous, to have it cleansed (*w*), and may itself cleanse and disinfect or destroy

(*n*) § 19.(*q*) §§ 44, 45, 47, 50, 51 and 52.(*r*) § 75.(*s*) § 77.(*o*) § 37.(*p*) § 72.(*t*) § 73.(*u*) § 83.(*v*) § 43.(*w*) § 74.

filthy and verminous articles (x). A county council or an urban or rural authority may undertake the cleansing of verminous persons (y).

Public Conveniences.—The Public Health Act, 1875 (z) empowered urban authorities to provide and maintain public conveniences. This power, however, did not enable them to construct underground conveniences in a street where the soil did not vest in them (a); but this and other limitations were removed by the Public Health Acts Amendment Act, 1907 (b). Now, under the Public Health Act, 1936, an urban or rural authority may provide public conveniences, including lavatories, but must not put them in or under any highway, of which the county council is the highway authority, without the latter's consent, while in such cases the county council may provide public conveniences. Bye-laws may be made regulating the conduct of persons using public conveniences and fees may be charged except for the use of urinals (c). Cognate powers give control over public conveniences erected by private persons so as to be accessible from the street (d), and enable a local authority to require the provision of sanitary conveniences in inns, refreshment-houses and places of public entertainment (e).

Baths and Washhouses.—Prior to the coming into force of the Public Health Act, 1936, the Baths and Washhouses Acts, 1846 to 1925, might be adopted by the local health authorities, or in a rural parish by the parish meeting. In the last case the provisions of the Acts were carried into execution by the parish council, if there were one, or by commissioners appointed by the parish meeting. The Public Health Act, 1936, has, however, in re-enacting this legislation removed its adoptive character, so that it now takes the form of powers to provide baths and washhouses and swimming baths and bathing

(x) § 84.

(y) §§ 85 and 86.

(z) § 39.

(a) *Tunbridge Wells Corporation v. Baird* [1896] A.C. 434; 38 Digest 230, 607.

(b) § 47.

(c) Public Health Act, 1936, § 78.

(d) § 88.

(e) § 89.

places (*f*), together with ancillary powers, such as the power to make bye-laws therefor (*g*).

In rural parishes also these provisions are no longer adoptive, but the power is conferred directly on the parish council, and the old commissioners cease to be a means by which a parish without a council can execute the Act (*h*). But the expenses of a parish council in this matter are still to count as if incurred under the Parochial Adoptive Acts, for the purpose of determining the limits of expenditure imposed on parish councils (*i*).

More recently the Physical Training and Recreation Act, 1937, has extended these powers, so far as they relate to the provision of public swimming baths or bathing places, to county councils, and has conferred powers of compulsory purchase for these purposes on all local authorities except parish councils.

Infectious Diseases.—The Minister has a wide power of making regulations relating to disease (*j*), and extensive powers are given to local authorities to prevent the spread of infectious diseases (*k*). In the first place, notice of the occurrence of certain infectious diseases, known as “notifiable diseases” (*l*), must be sent to the medical officer of health of the district (*m*). Moreover, a local authority with the approval of the Minister (or, in emergency and as a temporary measure, even without the Minister’s approval) may increase the number of notifiable diseases (*n*). Secondly, many provisions exist for preventing the spread of infection (*o*), and local authorities have powers in respect of disinfection and the removal to hospital of persons suffering from notifiable diseases (*p*).

Hospitals.—Powers to provide hospitals are conferred on both urban and rural authorities and also upon county councils. This apparent duplication is the result of historical causes, but

(*f*) § 221.

(*g*) §§ 222–234.

(*i*) Local Government Act, 1933, § 193.

(*j*) Public Health Act, 1936, § 143.

(*l*) § 343.

(*o*) §§ 148–165.

(*m*) §§ 144–146.

(*p*) §§ 166–170.

(*h*) § 230.

(*k*) §§ 144–180.

(*n*) § 147.

has proved useful in practice where co-ordination of effort is achieved. Under the Public Health Act, 1875, local authorities were empowered to provide hospitals (*q*). This power was supplemented by the Isolation Hospitals Acts, 1893 and 1901, under which county councils might provide isolation hospitals, but only for persons suffering from infectious diseases. Some co-ordination of these two codes was effected by the Local Government Act, 1929 (*r*), which extended to county councils the power to provide general hospitals and which required them to make schemes for the provision of hospitals for the treatment of infectious diseases (*s*). The Public Health Act, 1936, finally fuses the public health code with the Isolation Hospitals Acts.

In the first place, both county councils and urban and rural authorities may provide hospitals (*t*). This is a general power and is not limited to infectious diseases. So far as hospital accommodation is required for other than infectious diseases, the hospital authority must consult with voluntary hospitals, with a view to co-ordination (*u*), and may further make reasonable donations or subscriptions to voluntary hospitals (*v*). In respect to infectious diseases county councils must make schemes on a county basis (including, by agreement, adjacent county boroughs) for co-ordinating the hospital accommodation required (*w*). As ancillary to the provisions relating to hospitals, county councils or local authorities may provide laboratories and ambulances (*x*), and local authorities or parish councils may provide mortuaries (*y*).

Again, provisions are contained in the Public Health Act, 1936, for the registration of nursing homes with county and county borough councils and for their inspection (*z*). The treatment of tuberculosis is on a special footing and is in the hands of county and borough councils.

Maternity and Child Welfare.—The Notification of Births Act, 1907, was an adoptive Act which required the birth

(*q*) § 131.(*r*) § 14.(*s*) § 63.(*t*) Public Health Act, 1936, § 181.(*u*) § 182.(*v*) § 181.(*w*) § 185.(*x*) § 196.(*y*) § 198.(*z*) §§ 171-175.

of every child to be notified to the medical officer of health. The Act could be adopted by the council of a county borough, and either by the council of a non-county borough, urban or rural district, or by the county council. The Notification of Births (Extension) Act, 1915, made the provisions of the Act of 1907 compulsory everywhere, the councils of urban and rural districts in which it had not been adopted becoming local authorities for the purposes of the Acts. Provisions authorising the giving of maternity and child welfare services were contained in the Act of 1915 and in the Maternity and Child Welfare Act, 1918. This legislation has been repealed and re-enacted in the Public Health Act, 1936 (*a*).

Welfare authorities are the councils of county boroughs and, in county districts, either the council of the district or of the county, according as the matter happened to be arranged under the Notification of Births Acts (*b*). Child welfare work extends until a child reaches school age (*c*), when its care passes to the local education authority for elementary education (*d*) under the Children and Young Persons Act, 1933 (*e*). Accordingly, the Public Health Act, 1936 (*f*), provides that, where in any county district the welfare authority is not also the local education authority for elementary education, the Minister of Health may transfer maternity and child welfare functions to the latter authority.

Every welfare authority must appoint a maternity and child welfare committee, two of the members of which must be women, and may appoint to it persons of special qualifications by training and experience who are not members of the authority. All matters relating to the exercise of its welfare functions stand referred to the committee, to which the authority may also delegate its powers and duties (*g*). Notification of births must be made within thirty-six hours to the medical officer of health of the welfare authority (*h*), and

(*a*) § 203.

(*d*) See below, p. 722.

(*g*) § 201.

(*b*) § 200.

(*e*) § 96.

(*h*) § 203.

(*c*) § 204.

(*f*) § 200.

welfare authorities may, with the general approval of the Minister of Health, make arrangements for the care of expectant mothers and children under school age (*i*).

The necessity of arranging for an adequate domiciliary service of midwives lies on the councils of counties and county boroughs (*j*), and such arrangements may be made with welfare authorities or voluntary organisations. Welfare authorities also have certain duties with regard to child life protection, in particular in connection with the supervision of persons undertaking the nursing or maintenance of children for reward (*k*).

Parks and Pleasure Grounds.—The Public Health Acts confer many powers that once were looked upon as merely in the nature of amenities and convenience, but are now considered to be of direct benefit to the health as well as the enjoyment of the public. Thus an urban authority is empowered (*l*), to purchase and take on lease and to lay out lands as public walks and pleasure grounds, and to make bye-laws for their regulation. These powers were considerably extended by the provisions of the Open Spaces Act, 1906, the powers of which may be exercised by the council of any county or municipal or metropolitan borough or of any district, or by any parish council invested with the powers of the Act by order of the county council (*m*). The Act gave power to trustees and others, including trustees of charities, to transfer lands to local authorities for use as open spaces, and similar powers were given with respect to disused burial grounds. Still wider powers were conferred on local authorities by the Public Health Acts Amendment Act, 1907 (*n*), respecting lands to be used as public parks or pleasure grounds. Portions of such lands may be appropriated for games, and the authorities may provide or contribute towards the expenses of music in the parks or grounds.

(*i*) § 204. (*j*) Midwives Act, 1902, § 8; Midwives Act, 1936, § 1.

(*k*) Public Health Act, 1936, §§ 206–220.

(*l*) Public Health Act, 1875, § 164.

(*m*) See *A.-G. v. Poole Corporation*, [1938] 1 Ch. 23; [1937] 3 All E.R. 608; Digest Supp., though this case turned upon special facts.

(*n*) § 76.

The Physical Training and Recreation Act, 1937, as amended and extended by the Education Act, 1944 (*o*), also confers wide powers on county councils, county borough councils, county district and parish councils. These authorities may provide and maintain gymnasiums, playing fields, holiday camps or camping sites and "community centres." These may be managed by the local authority itself or may be let at nominal or substantial rents for these purposes. Moreover, grants in aid of capital expenditure may be paid by the Ministry of Education.

Water, Gas and Markets.—The Public Health Acts, 1875 and 1936, also contain provisions with respect to water supply, gas and markets. These services are not merely related to public health—they are also in the nature of trading services, and are consequently dealt with in the chapter on Trading Services (*p*), where both aspects of their use are considered.

The Act of 1875 also imposes duties with respect to highways and streets. In the main these provisions deal with the first formation of streets and the subsequent steps by which they become highways repairable by the inhabitants at large. It will be more convenient to have these provisions taken in the chapter on Highways, Streets and Bridges (*q*), and it may suffice at this stage to point out the justification for incorporating a portion of highway law in the Public Health Acts. In laying out a building estate, and even in building a single house, it is necessary, in the interests of public health, to ensure the provision of sanitary adjuncts, such as drains and sewers, and the formation of a durable surface of the street, up to the time when the street is ready to be adopted as a public street or highway, and these matters relate essentially to public health.

(*o*) See the Education Act, 1944, § 53. (*p*) P. 729. (*q*) P. 596.

CHAPTER XXI

HOUSING

History.—It is only in comparatively recent times and by reason of exceptional circumstances that it has become the recognised duty of the local authority to build and let dwelling-houses for occupation by those working-class members of the community, for whom adequate and satisfactory accommodation has not been otherwise provided. The necessity for the imposition of this duty has been forced upon the attention of Parliament by economic changes. The industrial revolution which began in the early years of the nineteenth century drew to the towns large numbers of workers who were attracted by the prospects of high wages and regular employment. Industry was making great advances, the utilisation of steam power aided the extension of railways and the development of processes of manufacture, while trade was being extended to all parts of the world. Unfortunately, in those days of *laissez-faire*, it was not considered necessary that special provision should be made for housing the labourers and their families who flocked to the towns, and thus overcrowding and insanitary conditions became prevalent. The steps taken to remedy these conditions relate chiefly to the history of public health, and are dealt with in the section of this work relating to that subject. They did not include the erection of new and sanitary houses, for it was not considered to be the duty either of the employer or of the public represented by the local authorities to make such provision. The houses that were erected for a rapidly increasing population were provided chiefly by the speculative builder, who was compelled to build at a cost corresponding to the rent prospective tenants could

afford to pay, and as labour was underpaid the houses built were far too often constructed of poor materials and by scamped work. They were known, and rightly, as "jerry built."

Labouring Classes Lodging Houses Act, 1851.—It was not until 1851 that an attempt was made to deal by statute with the housing question, and an adoptive Act of that year empowered borough councils and local boards of health to erect houses described in the statute as "lodging houses for artisans." Various Acts passed between 1851 and 1875, the year when the Public Health Act was passed, gave considerable powers to local authorities to control the erection and maintenance of dwelling-houses and to secure the closing of buildings unfit for human habitation by the exercise of bye-law powers, and the Municipal Corporations Act, 1882, contained provisions enabling corporate lands to be utilised as sites for workmen's dwellings (*a*).

Royal Commission.—In 1884 a Royal Commission was appointed to inquire into the housing conditions of the working classes, and after lengthy investigation a Report was issued which forms the basis of modern housing legislation. The Report recommended a wide extension of the powers and duties of local authorities in relation to the housing of the working classes, including effective supervision and inspection of the sanitary conditions of such houses, the prevention or removal of sanitary defects, powers of compulsory purchase of land required for the erection of workmen's dwelling-houses, and the provision of Government loans on cheap terms for municipal housing schemes. As a result of the labours of the Royal Commission, the Housing of the Working Classes Act of 1890 was passed into law.

Housing of the Working Classes Act, 1890.—The framers of the Act had in view the removal of houses which were unfit for habitation and the provision of new houses to

make good the increasing shortage which private enterprise was not meeting. The removal of insanitary dwellings was to be attained either in respect of groups or clusters of houses, or by attacking individual houses. There were thus three purposes to be effected—first, the removal of unhealthy areas, powers for which were given by Part I of the Act; secondly, the closing and if need be the demolition of separate unhealthy dwellings, dealt with in Part II; and thirdly, the provision of new dwelling-houses for the working classes, authorised by Part III. The Act of 1890 and various amending Acts have now been repealed, and extended powers have been granted by Parliament to local authorities to meet changing conditions, but the principles and in large measure the procedure laid down in the Housing of the Working Classes Act, 1890, are reproduced in the Acts at present in force.

Later Legislation.—Legislation on the housing question is still based upon the three-fold division of its object which was laid down in the Act of 1890, although the emphasis on its different aspects has varied from time to time, and the problem of housing in rural areas has had to meet exceptional difficulties of its own, while the need to check overcrowding has been realised. Acts passed in 1903 and 1909 (*b*), so far as they relate to housing, were in the nature of amending legislation, conferring further powers, but introducing no new principles, while later Acts of 1919, 1923 and 1924 (*c*) were directed almost entirely to the erection of new houses to meet the lamentable shortage of accommodation for the working classes. These Acts also made provision for grants in aid to be given to local authorities. In 1925 a consolidating Act appeared, while the Act of 1930 dealt primarily with the problem of slum clearance. In 1933 it was felt that further grants to local authorities to assist in meeting the housing shortage were no longer justified, and new grants merely for

(*b*) Housing of the Working Classes Act, 1903; Housing, Town Planning, etc. Act, 1909.

(*c*) Housing, Town Planning, etc. Act, 1919; Housing, etc. Act, 1923; Housing (Financial Provisions) Act, 1924.

this purpose were prohibited. The problem of slum clearance in turn brought into prominence the evils of overcrowding and led to the Act of 1935 (*d*). The present measure in force, the Housing Act of 1936, was a consolidating but not final Act, for even before the war the problem of rural housing had led to further legislation (*e*), and the Housing (Financial Provisions) Act, 1938, introduced new provisions with respect to the contributions to be made out of the Exchequer and by local authorities in respect of grant-aided housing accommodation for the working classes completed after the beginning of the year 1939.

The complete cessation of building which occurred on the outbreak of war in 1939, coupled with the loss of accommodation caused by war damage and the deterioration of other accommodation through inability to carry out necessary repairs, has now presented the country with a housing problem without parallel.

In accordance with present Government policy all possible endeavours are being made to meet this problem and further legislation has been passed, and still more will have to be passed, in order to enable it to be overcome within a reasonable period. It will, of course, be appreciated that little can at present be done to enforce the provisions of the Housing Acts relating to the demolition of unfit houses and the work of local authorities in this connection is temporarily restricted as a result of Government advice and administrative procedure. As regards legislation, in the first place, the Housing (Temporary Provisions) Act, 1944, temporarily makes two changes in the law : (1) enables subsidies to be paid in respect of houses built by local authorities to meet general needs (and not merely to provide accommodation for the working classes, though the amount of the subsidy has not yet been fixed ; a Bill for this purpose is now before Parliament) ; (2) enables land to be acquired compulsorily without the holding of a public local inquiry.

(*d*) Housing Act, 1935, now repealed by the Act of 1936.

(*e*) Housing (Rural Workers) Amendment Act, 1938, and Housing (Rural Workers) Act, 1942.

Another step relates to the provision of temporary houses by local authorities, for which provision has been made by the Housing (Temporary Accommodation) Acts, 1944 and 1945. Power to carry out the repair of war-damaged houses was given by the Housing (Emergency Powers) Act, 1939, which is amended by the War Damage Act, 1943.

Housing Authorities.—The local authorities for housing are borough and district councils, and in London the London County Council and the Common Council of the City of London, though in certain matters the metropolitan borough councils exercise powers in place of the County Council (*f*).

Housing Act, 1936.—This legislation, as already indicated, falls under the following heads :

- (i) the sanitary condition of the individual house,
- (ii) the treatment of unfit houses situated in groups,
- (iii) overcrowding,
- (iv) the provision of new houses.

1. The Individual House.—The Common Law implies no warranty or condition as to the fitness of an unfurnished house or flat let for human habitation (*g*) ; but by way of exception to this general rule the Housing Act, 1936 (*h*), in the case of small dwelling-houses (*i*) provides that in any contract for letting for human habitation there shall be implied a condition that at the commencement of the tenancy the house is in all respects reasonably fit for human habitation, and an undertaking by the landlord to keep it in such a state

(*f*) Housing Act, 1936, §§ 1, 24, 33, 37, 39, 53, 56, 69, 103, 181–186.

(*g*) *Lane v. Cox* [1897] 1 Q.B. 415; 31 Digest 179, 3120; *Cruse v. Mount* [1933] Ch. 278; Digest Supp.

(*h*) § 2.

(*i*) Where the rent does not exceed £40 in London, or £26 elsewhere. In calculating the rent there must be deducted any part representing rates paid by the landlord, but any discount he is entitled to retain under a compounding arrangement with the rating authority (see above, p. 160) must be disregarded: *Jones & Jones v. Nelson* [1938] 2 All E.R. 171; Digest Supp. The obligation also applies to a house provided by his employer to a worker in agriculture as part of his remuneration: *ibid.*, §§ 2, 3.

during the tenancy (j). To leave the obligations thus imported into the tenancy agreement of such houses to be enforced by the tenant by action in the courts would in the circumstances often prove nugatory as a method of preserving a reasonable standard of housing accommodation in an area, and accordingly the contractual liability is strengthened by administrative action on the part of the local authority. Thus the Act casts on every local authority the duty of inspection from time to time with a view to ascertaining whether houses are unfit for human habitation (k). Moreover, the local authority may, and, if required by the Minister of Health, must make and enforce bye-laws providing for a number of particulars relating to the fitness, from a physical and health point of view, of houses "which are occupied, or are of a type suitable for occupation, by persons of the working classes" (l). It will be seen that administrative action in this matter (and the same is true of the other provisions of the Act) is not limited to houses let at certain rents, nor indeed to houses which are let, but extends to every type of working-class house.

If individual unfit houses nevertheless exist, the local authority may exercise further powers. In the Housing of the Working Classes Act, 1890, the corresponding powers could only be exercised upon receipt by the local authority of a report, called "an official representation," made by its medical officer of health. This safeguard against unfair or ignorant action to the detriment of the property owner has, however, with the passage of time been removed as a condition precedent to action on the part of the local authority, which may now act on other information in its possession. Nevertheless, the official representation is still the usual and on the whole the most desirable way of initiating proceedings in respect of unfit houses. Thus the medical officer of health is under a duty to make an official representation when he is

(j) See *Morgan v. Liverpool Corporation* [1927] 2 K.B. 131; Digest Supp.

(k) Housing Act, 1936, § 5.

(l) *Ibid.*, §§ 6-8.

of opinion that a house is unfit for human habitation, and, in addition to his general duty of inspecting the housing accommodation in his district, he must forthwith inspect and report upon any houses about which complaints are addressed to him by any justice of the peace, or by any four or more local government electors, or by any parish council (*m*).

When a local authority, whether as a result of an official representation or otherwise, is satisfied that an individual house is in any respect unfit for human habitation, it must consider whether it is capable of being rendered fit at a reasonable cost, having regard to the estimated cost of repairs and the value of the house when repaired. If the local authority comes to the conclusion that the house can be so rendered fit, it is its duty to serve upon the person receiving the rent or otherwise having control of the house, a notice requiring the execution of specified repairs (*n*). Within twenty-one days the owner may appeal to the County Court (*o*). Subject to any such appeal, if the notice is not complied with, the local authority may itself do the specified repairs and recover the cost (*p*). If, on the other hand, the local authority is satisfied that the house cannot be rendered fit for human habitation at reasonable expense, it is its duty to serve upon the owner a notice intimating that he may attend before the authority and that any offer he may choose to make with regard to the carrying out of repairs or the future user of the house will be taken into consideration. If the owner makes an offer to carry out within a specified time works which will render the house fit for human habitation or to give an undertaking that it shall not be used for human habitation until rendered so fit, the local authority may accept either offer. But, if a satisfactory undertaking is not given, or, having been given, is not carried out, the authority must make a demolition order requiring the vacation and demolition of the house (*q*). Within twenty-one days the owner may appeal to the County Court, when the

(*m*) Housing Act, 1936, § 154.

(*o*) *Ibid.*, § 15.

(*q*) *Ibid.*, § 11.

(*n*) *Ibid.*, § 9.

(*p*) *Ibid.*, § 10.

judge may vary, confirm, or quash the order, or accept any undertaking to the same extent as the local authority might have accepted it (r). Subject to any appeal, if the order is not obeyed, the local authority may itself demolish the house and recover the cost of so doing from the owner (s).

Where the unfitness relates only to part of a house, the local authority, instead of a demolition order, must make a closing order, prohibiting its use for any purpose other than one approved by the local authority (t). In respect of closing orders exactly the same right of appeal exists as in the case of demolition orders (u).

Where these drastic remedies by way of demolition or closing order are taken, the local authority is empowered to make *ex gratia* payments towards the occupier's removal expenses, and, where he carried on a trade or business in the house, towards his loss from disturbance of that trade or business (v); but the Act makes no provision for compensating the owner as such for the loss of his property.

2. Groups of Unfit Houses.—The problem of slum clearance is not, of course, confined to the individual house: a more frequent cause of bad housing conditions is the existence of a group of insanitary houses, and various methods of dealing with such circumstances are provided by the Housing Act, 1936. These powers may conveniently be grouped under the two headings of clearance and re-development.

(a) Clearance.—A local authority may, as a result of an official representation or otherwise, become aware of the existence of an insanitary area which can only be effectively dealt with by wholesale clearance of the buildings in it. The first step in setting the appropriate procedure in motion is the declaration of the area as a "clearance area." Before passing

(r) Housing Act, 1936, s. 15; *Fletcher v. Ilkeston Corporation* (1931) 48 T.L.R. 44; Digest Supp.

(s) Housing Act, 1936, § 13.

(u) *Ibid.*, § 15.

(t) *Ibid.*, § 12.

(v) *Ibid.*, § 18.

the necessary resolution to this effect the local authority must satisfy itself on four points :

- (i) that the houses are through disrepair or sanitary defects unfit for human habitation, or that by reason of their bad arrangement or the narrowness or bad arrangement of the streets they are dangerous or injurious to the health of the inhabitants of the area, and
- (ii) that the most satisfactory (and not necessarily, therefore, the only) method of dealing with the conditions in the area is the total demolition of the buildings therein, and
- (iii) that, before the houses in the area are demolished, there will be available, and if necessary provided by the local authority, housing accommodation for the residents who will be displaced, and
- (iv) that the resources of the local authority are sufficient for the purpose of carrying the resolution into effect (*w*).

In such circumstances the area must be defined on a map and the local authority must pass a resolution declaring the area to be a clearance area to be cleared of all buildings. A copy of this resolution, together with a statement of the number of persons of the working classes resident in the area must be forthwith sent to the Minister of Health (*x*).

In exercising these powers it seems that the local authority is acting purely administratively. It need give the owner no opportunity to be heard before it passes the resolution (*y*). It must, of course, have some material before it in reaching its conclusions, but this seems to mean no more than that it must act in good faith (*z*).

It next becomes the duty of the local authority to implement its resolution and secure the clearance of the buildings in the clearance area, and for this purpose it may adopt either of two

(*w*) Housing Act, 1936, § 25.

(*x*) *Ibid*.

(*y*) *Fredman v. Minister of Health* (1935) 154 L.T. 240; Digest Supp.

(*z*) *Re Bowman* [1932] 2 K.B. 621; Digest Supp.; *Re Falmouth Clearance Order, 1936* [1937] 3 All E.R. 308; 157 L.T. 140; Digest Supp.; *Stocker v. Minister of Health* [1938] 1 K.B. 655; [1937] 4 All E.R. 678; Digest Supp.

methods. It may make a clearance order, which makes it obligatory for the owner himself to demolish the buildings, or it may make a compulsory purchase order, under which the local authority acquires the area and itself demolishes the buildings thereon (*a*). The former alternative saves cost to the local authority and is usually adopted, except where the authority desires to acquire the land for some public purpose or to obtain control over its future development. The local authority must, no doubt, when the order comes to be confirmed by the Minister of Health, be prepared to justify the choice it has made, but it is in law under no onus in this matter as against the property owner (*b*).

In either case the procedure is much the same. The local authority, having made the clearance or compulsory purchase order, must advertise it and serve notices on interested parties. The order is then submitted to the Minister for confirmation. Within a prescribed period interested parties may object, and if objections are received by the Minister he must cause a public local inquiry to be held and must consider the report of the inspector and the objections before deciding whether to confirm the order (*c*). Before an objection is lodged the Minister acts administratively (*d*), as is also the case if no objection is lodged (*e*). But if an objection is made the position is immediately changed. The Minister then acts quasi-judicially and must observe the rules of natural justice (*f*), while the inspector holding the local inquiry also acts quasi-judicially (*g*). But this does not entitle the objector to see the report presented by the inspector to the Minister (*h*), nor to

(*a*) Housing Act, 1936, § 25.

(*b*) *Re Greenwich Housing Order, 1936* [1937] 3 All E.R. 305; 157 L.T. 67; Digest Supp.; *Re Brighton Corporation Order, 1937* [1938] 2 All E.R. 146; 158 L.T. 496; Digest Supp.

(*c*) Housing Act, 1936, 1st and 3rd Schds.

(*d*) *Frost v. Minister of Health* [1935] 1 K.B. 286; Digest Supp.; *Offer v. Minister of Health* [1936] 1 K.B. 40; Digest Supp.

(*e*) *Errington v. Minister of Health* [1935] 1 K.B. 249; Digest Supp.

(*f*) *Ibid.*; *Horn v. Minister of Health* [1937] 1 K.B. 164; [1936] 2 All E.R. 1299; Digest Supp.

(*g*) *William Denby & Sons, Ltd. v. Minister of Health* [1936] 1 K.B. 337; Digest Supp.

(*h*) *Ibid.*

attend before the Minister to argue a point of law raised at the inquiry (*i*).

After confirmation by the Minister, the order must be again advertised and notices must be served on persons who have objected or appeared at the local inquiry. Any person aggrieved may, within six weeks, apply to the High Court, which may quash the order if satisfied either that it was not within the powers of the Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any requirement of the Act (*j*). This right of appeal to the Courts is, however, strictly construed. It is a creature of the statute and can only be invoked in the cases which the statute envisages (*k*). Thus many matters of procedure or fact cannot be reviewed by the Courts (*l*). On the other hand questions of law governing the power to act under the Act are open to review (*m*). Similarly, failure to observe the rules of natural justice when the inspector or the Minister is acting quasi-judicially vitiates the proceedings and renders them void, so that any further consideration of the order by the Minister would be outside the powers of the Act (*n*). It also seems possible that the Courts may be able to review whether the Minister had any material before him in confirming the order, but this seems to refer either to the obvious requirement of good faith or else to the question

(i) *Re Sir J. B. W. Simeon, Bt.* [1935] 2 K.B. 183; Digest Supp.

(j) Housing Act, 1936, 2nd Schd.

(k) *Re Bowman* [1932] 2 K.B. 621; Digest Supp.; *Marriott v. Minister of Health* [1937] 1 K.B. 128; [1936] 2 All E.R. 865; Digest Supp.; *Re Falmouth Clearance Order, 1936* [1937] 3 All E.R. 308; 157 L.T. 140; Digest Supp.

(l) *R. v. Minister of Health. Ex parte Hack* [1937] 3 All E.R. 176; 157 L.T. 118; Digest Supp. (sufficiency of particulars); *Stocker v. Minister of Health* [1938] 1 K.B. 655; [1937] 4 All E.R. 678; Digest Supp. (no appeal on finding of fact).

(m) *Marriott v. Minister of Health* [1937] 1 K.B. 128; Digest Supp. (property demolished); *Re Hammersmith Clearance Order, 1936* [1937] 3 All E.R. 539; 157 L.T. 142; Digest Supp.; *Re Newhill Compulsory Purchase Order, 1937* [1938] 2 All E.R. 163; 158 L.T. 523; *Re Butler* [1938] 2 K.B. 210; [1938] 2 All E.R. 279; Digest Supp. (whether property within Act). But not other decisions of law; *Stocker v. Minister of Health* [1938] 1 K.B. 655; [1937] 4 All E.R. 678; Digest Supp.

(n) *Frost v. Minister of Health* [1935] 1 K.B. 286; Digest Supp.; *Errington v. Minister of Health* [1935] 1 K.B. 249; Digest Supp.

whether the Act covers the particular set of circumstances in question (*o*).

Subject to any such appeal, the order becomes operative within six weeks after publication of the notice of confirmation by the Minister and cannot be "questioned by prohibition or *certiorari* or in any legal proceedings whatsoever, either before or after" confirmation (*p*).

Compensation.—The present rules governing the payment of compensation in respect of clearance areas have only been reached after various statutory expedients have been tried. Before the Housing Act of 1930 the procedure applicable led in all cases to the purchase of unhealthy areas by the local authority. But in respect of the compensation payable for the land so taken there was a gradual hardening of the policy of Parliament against the landowner.

Under the Housing of the Working Classes Act, 1890, compensation was based on the fair market value, but without any additional allowance for compulsory purchase. On the other hand, the arbitrator was directed to reduce the compensation where the rental was enhanced through illegal user or overcrowding of the premises, or where they were a nuisance or unfit for human habitation (*q*). The Act of 1919 reduced the compensation for unfit property to the value of the site cleared of buildings and available for development in accordance with the local building bye-laws: in other words, the buildings were not to be paid for (*r*). The Housing Act, 1925, brought into play the principle of betterment by allowing any increased value, given to other property of the same owner by the action of the local authority in dealing with the unhealthy area, to be set off against the compensation payable (*s*).

(*o*) *Burgesses of Sheffield v. Minister of Health* (1935) 154 L.T. 183; Digest Supp.; *Stocker v. Minister of Health* [1938] 1 K.B. 655; [1937] 4 All E.R. 678; Digest Supp.; *Re Falmouth Clearance Order, 1936* [1937] 3 All E.R. 308; 157 L.T. 140; Digest Supp.

(*p*) See *R. v. Minister of Health. Ex parte Hack* [1937] 3 All E.R. 176; 157 L.T. 118; Digest Supp.

(*q*) Housing of the Working Classes Act, 1890, § 21.

(*r*) Housing, Town Planning, etc., Act, 1919, § 9 and 1st Schd.

(*s*) Housing Act, 1925, § 46 and 1st Schd., Pt. I.

The present procedure for dealing with clearance areas was first introduced by the Housing Act, 1930, and permits the local authority to proceed either by clearance order, when the owner is required himself to clear the site, or by compulsory purchase order, when the local authority purchases the site for demolition. If the local authority proceeds by way of clearance order no compensation is payable, the owner being left with the cleared site for re-development. If, on the other hand, the local authority acquires the area under a compulsory purchase order, it must obviously pay for the property it thus acquires. So far as the property consists of unfit houses, the compensation is assessed on the value of the site cleared of buildings and available for development in accordance with the building bye-laws (*t*). So far, however, as the area contains property, not in itself unfit, but included merely because of bad arrangement, the value of the buildings as well as the site is to be paid for, but compensation is to be reduced on account of illegal user, overcrowding, insanitary condition or disrepair, while betterment accruing to other properties of the owner must be set off against the compensation (*u*).

However, to these general principles for assessing compensation certain exceptions exist. Whether the local authority has proceeded by way of clearance order or compulsory purchase order, if the Minister is satisfied that a house has, in spite of its unfitness, been well maintained by its owner, he may order the local authority to make a payment representing the cost of maintenance during the preceding five years (*v*). Again, removal from their homes may cause hardship to occupiers of houses in clearance areas, and yet such occupiers have not as such any claim to compensation for their compulsory removal. Cases of hardship of this sort are met by a power conferred on the local authority to make *ex gratia* payments to occupiers displaced, whether they are merely tenants or even owners, towards their costs of removal, or, in the case of a person carrying on trade or business in the area, to cover loss from

(*t*) Housing Act, 1936, § 40.

(*u*) *Ibid.*, § 40 and 4th Schd.

(*v*) *Ibid.*, § 42.

disturbance to that trade or business owing to his displacement (*w*). This power to make *ex gratia* allowances is further extended to the case of a retail shopkeeper who suffers personal hardship by the loss of business owing to the removal of his customers from the neighbourhood (*x*).

(b) Re-development.—In some instances it is found desirable to re-develop an area instead of causing its demolition, and to enable this to be done, the Housing Act, 1936, enacts that if a local authority is satisfied that an area in its district

- (i) contains fifty or more working-class houses,
- (ii) that at least one-third of the houses are overcrowded or congested,
- (iii) that conditions are such that the area should be used for housing, and
- (iv) that the area should be re-developed as a whole,

it must pass a resolution declaring the area, as defined on a map, to be a proposed re-development area. A copy of the resolution and the map are to be sent to the Minister (*y*). Within six months the local authority must submit to the Minister a re-development plan of the area, showing particularly the intended provision of houses, streets and open spaces. This is to be publicly advertised and notices thereof are to be served on persons affected thereby. If no objection is made the Minister may approve the plan, with or without modifications, but otherwise he must cause a public inquiry to be held and thereafter he may approve the plan, with or without modifications (*z*). The procedure for acquiring the area and re-developing it according to the plan is the same as in the case of a clearance area (*a*). The compensation to be paid in respect of unfit houses is site value, and for other premises compensation is reduced where there is illegal user, overcrowding, sanitary defects or disrepair (*b*). Owners of land in the area may submit proposals for re-development to the local authority, and if these are approved and proceeded with

(*w*) Housing Act, 1936, § 44.

(*x*) *Ibid.*, § 44.

(*y*) *Ibid.*, § 34.

(*z*) *Ibid.*, § 35.

(*a*) *Ibid.*, § 36.

(*b*) *Ibid.*, § 40.

the local authority cannot take steps for clearance and re-development (c).

3. Overcrowding.—The duty is placed on every local authority to take effective steps to abate overcrowding in its district. For this purpose the authority is required to inspect the district and report to the Minister of Health what houses are overcrowded and as to the number of new houses required in order to abate the overcrowding, with proposals for the provision of such houses (d). Overcrowding is defined to exist when the number of persons sleeping in the house is either such that two or more of those persons, being over ten years old, of opposite sexes and not living together as husband and wife, must sleep in the same room, or that there is an excess of the permitted number of persons, as ascertained in relation to the number and floor area of rooms by reference to a scale of accommodation scheduled to the Act. For these purposes a child under one year is not taken into account, while a child between one and ten years is reckoned as one half unit (e).

An occupier or landlord permitting overcrowding after the day appointed by the Minister commits an offence and is liable to proceedings before a court of summary jurisdiction. Proceedings may be taken by the local authority after service of notice on the occupier, but to prevent hardship to present occupiers certain temporary relaxations are permitted (f).

4. Provision of Houses.—New grants towards the cost of providing housing accommodation, except in connection with action taken by the local authority in respect of special matters, such as slum clearance, ceased to be payable under the Housing (Financial Provisions) Act, 1933, but powers and duties to provide housing accommodation still lay on local authorities (g).

(c) Housing Act, 1936, § 50.

(d) Housing Act, 1936, § 57 (1); the inspection and report with consequent proposals may be repeated when the local authority considers the occasion has arisen therefor and must be repeated when the Minister so directs; § 57 (2).

(e) Housing Act, 1936, § 58.

(f) *Ibid.*, § 59.

(g) See now the Housing (Temporary Provisions) Act, 1944, below, p. 534.

Apart from the particular duties to provide new houses where necessary to replace those demolished under action taken by the local authority in connection with slum clearance (*h*) and to relieve overcrowding (*i*), every local authority must consider the housing needs of its district and, as often as occasion arises, or within three months after being required to do so by the Minister, it must submit to the Minister proposals for the provisions of new houses for the working classes (*j*).

Extensive powers for the provision of new housing accommodation are conferred on local authorities. They may, in the first place, themselves build houses for the working classes (*k*), and for this purpose they may acquire land, if necessary by compulsory purchase order (*l*). Again, they may assist the provision of new housing accommodation by other persons. Thus, local authorities and county councils may, subject to conditions approved by the Minister, advance money on mortgage to enable owners of working-class houses to re-condition them (*m*). Again, they may advance money on mortgage, or guarantee advances made by building societies for the erection of houses for the working classes (*n*). Local authorities and county councils may promote or assist "housing associations," that is, societies or companies empowered to provide housing accommodation for the working classes and either not trading for profit or limited as to the rate of interest they can pay on their capital. Such assistance may be given to housing associations by direct grant, or loan, or by guarantee or subscription to their capital (*o*).

Powers of managing the houses provided by them are conferred on local authorities (*p*). But in this matter an interesting experiment has been made by the Housing Act, 1935 (*q*).

(*h*) Housing Act, 1936, § 45. (*i*) *Ibid.*, § 57. (*j*) *Ibid.*, § 71.

(*k*) *Ibid.*, § 72. By the Housing (Temporary Provisions) Act, 1944, provision is made for the payment of subsidies (of an amount to be fixed by a Bill now before Parliament) in respect of houses built to meet general needs.

(*l*) *Ibid.*, §§ 74 and 75. See also the Housing (Temporary Provisions) Act, 1944.

(*m*) *Ibid.*, § 90.

(*n*) *Ibid.*, § 91.

(*o*) *Ibid.*, §§ 93 and 94; Housing (Financial Provisions) Act, 1938, § 8.

(*p*) *Ibid.*, §§ 83 to 85.

(*q*) § 25; now Housing Act, 1936, § 87.

The existence of large numbers of ratepayers and local government electors who are council tenants may lead to political difficulties. Hence there has been introduced into local government an idea borrowed from the "Public Corporations," which have in modern times been created to remove certain matters of central administration from the sphere of politics. A local authority, by a scheme made by it and approved by the Minister, may provide for the incorporation of a "housing management commission" in which will be vested the management of the authority's housing estates. The scheme may provide (*inter alia*) for the appointment of the members of the commission and for the remuneration of its chairman; it also determines the financial relations between the local authority and the commission as well as the extent to which the local authority's powers of management are to be transferred. The greatest elasticity is provided, the scheme determining to what extent the commission shall be really independent of the local authority. But when once such a commission has been created, it is no longer within the power of the local authority alone to revoke the delegation of powers to it, for the scheme under which it was constituted can only be amended by a further scheme approved by the Minister (*r*).

Rural Housing.—The difficulties of rural housing, which have led to special statutory provisions, arise from two factors. The comparative poverty of rural district councils, largely consequent upon the de-rating of agricultural land, and the low wage-scales of agricultural workers combine to make improvement of rural housing conditions difficult. These difficulties have been met in several ways. The county council is charged with the duty of keeping constant supervision over the housing activities of rural district councils (*s*), who thus gain the advantage of consultation with the county and its officers. By agreement the county council may accept all or any of the responsibilities of a rural district council relating to the provision of housing accommodation. Such an agree-

(*r*) Housing Act, 1936, § 87.

(*s*) *Ibid.*, § 88.

ment may amount to a complete relinquishment of the rural district council's powers in favour of the county council, or it may be restricted in scope. Thus it may provide for the raising of loans by the county council, so enabling the rural district council to obtain the advantage of the more favourable loan terms on which the county council can borrow money, or for the vesting in the rural district council of houses built by the county council (*t*).

The supervision of the county council over the housing activities of rural district councils is rendered effective by default powers. After holding a local inquiry, the county council may make an order transferring to itself the powers of a rural district council which is found to be in default (*u*). If the county council fails without good reason to make such an order, the Minister may make it, and, if the county council fails to exercise its transferred powers, the Minister may, after holding a local inquiry, make an order directing the county council to exercise them or rendering them exercisable by himself (*v*).

In general, since the Housing (Financial Provisions) Act, 1933, grants have not been payable simply in respect of the provision of new housing accommodation as such, but grants remained payable towards the provisions by district councils (and whether rural or urban) of housing accommodation for the agricultural population until 30th September, 1945, and these grants were at a specially high rate (*w*). Moreover, the county council had also to contribute towards the cost of such houses (*x*).

The principle of assisting the owners of houses suitable for occupation by members of the agricultural population to recondition them was introduced by the Housing (Rural Workers)

(*t*) Housing Act, 1936, § 89. (*u*) *Ibid.*, § 169. (*v*) *Ibid.*, §§ 169 and 170.

(*w*) Housing (Financial Provisions) Act, 1938, § 2. The grant is normally at the rate of £10 per annum per house for 40 years, but may be increased up to £12 where, owing to high costs and low rents, an undue burden would otherwise fall on the district council. See also the Housing (Rural Workers) Act, 1942.

(*x*) Housing (Financial Provisions) Act, 1938, § 7. Normally at the rate of £1 per annum for 40 years, but, where the Minister pays at a rate higher than £10 per annum, at a proportionately higher rate.

Act, 1926 (y). County councils (z) might give such assistance either by way of loan or grant, but the recipient became subject to conditions, operating for a period of twenty years, and providing for the reservation of the house for members of the agricultural population and as to the rent to be charged and the maintenance of the house in proper repair. These conditions could, however, be terminated by repayment of a proportionate part of the advance, while breach of conditions lead to forfeiture of the advance. Grants were payable by the Minister to councils making advances under the Housing (Rural Workers) Acts (a).

The principle of giving financial assistance to private individuals was carried a stage further by the Housing (Financial Provisions) Act, 1938 (b), which permitted advances to be made by the council of a county district to persons providing new housing accommodation for members of the agricultural population. Such advances towards new building were made subject to conditions requiring that the houses should be reserved for members of the agricultural population, and let at low rents and kept in proper repair. Grants were payable by the Minister to district councils so assisting the provision of new houses.

The Housing (Temporary Provisions) Act, 1944, amended the Housing (Financial Provisions) Act, 1938, and removed the restriction which limited the grant of Exchequer subsidy to houses built by local authorities to provide for slum clearance, for the abatement of overcrowding and for the housing of agricultural workers, so as to enable the subsidy to be paid in respect of houses built by local authorities to meet general needs. The amount of the subsidy remains to be fixed by a Bill now before Parliament.

(y) Extended by the Housing (Rural Workers) Amendment Act, 1931, the Housing Act, 1935, §§ 37 to 39, the Housing (Rural Workers) Act, 1938, and the Housing (Rural Workers) Act, 1942.

(z) County and county borough councils were the local authorities for these Acts, but the powers of county councils might be transferred to the councils of county districts.

(a) Housing (Rural Workers) Act, 1926, § 4. Grants amounted to one-half of the loan charges falling upon the local authorities for 20 years.

(b) § 3.

Government Grants.—In the Acts relating to housing passed in the nineteenth century there was no provision for making grants to local authorities in aid of their expenditure on housing schemes, and the only assistance offered under the Housing of the Working Classes Act, 1890, was based on a recommendation of the Royal Commission of 1884, that the Public Works Loan Commissioners might, if they thought fit, lend to any local authority the sums required for the purpose of carrying out its powers and duties in relation to the housing of the working classes. In 1903 it was realised that the local authorities were faced with an increasingly difficult financial problem, and in conformity with the recommendation of a Departmental Committee the maximum period for repayment of loans was extended to eighty years.

The position was entirely changed after the War of 1914–18, and the policy of financial assistance, which was adopted by the Government, took different courses in the case of the provision of new accommodation to meet the general housing shortage on the one hand, and in the case of re-housing for slum clearance and overcrowding on the other.

Provision of New Houses.—The general shortage of houses after the War led to a succession of Acts providing Government assistance for local authorities building new houses. As, owing to the high cost of building, it was then impossible to build houses which could be let at rents sufficient to meet the interest on the cost, the Housing, Town Planning, etc., Act, 1919, provided that, where a local authority built new houses with the approval of the Local Government Board, the annual loss incurred, in excess of the product of a rate of one penny in the pound, should be borne by the Government. Large numbers of houses were built under the powers of the Act, with, however, the unfortunate result that wages and the cost of materials were forced up to such an extent that it was found necessary to cease building under the Act. The grant under the Act of 1919 is still being paid in respect of houses built

under it, and will continue to be payable until the loans raised have been liquidated.

The Housing, etc., Act, 1923, met the problem in a new manner. In respect of houses built under it the Government paid a fixed annual grant of six pounds a house for twenty years, leaving the ultimate loss to be borne by the local authority. The desire to accelerate the provision of new houses led in turn to the Housing (Financial Provisions) Act, 1924. This offered a substantially higher grant (c), but imposed "special conditions" on the houses in respect of which it was paid. These special conditions were designed to secure that the houses should be used solely as dwellings for the working classes, that the rents in the aggregate should not exceed pre-war rents, and that in letting reasonable preference should be given to large families.

The general policy of making grants for the provision of new housing accommodation was terminated by the Housing (Financial Provisions) Act, 1933, which prohibited the making of new grants under the Acts of 1923 or 1924, on the grounds that the housing shortage had so far been overcome and that interest rates and building costs had so far fallen that no further grants were justified. But this Act did not, of course, exonerate the Minister from continuing to pay contributions in respect of houses to which subsidy had already been attached. Moreover, new grants were still payable in respect of the provision of housing accommodation for the agricultural population (d), in connection with losses incurred under guarantees to building societies (e), and in connection with slum clearance (f).

The amount of grant which is to be payable under the Housing (Temporary Provisions) Act, 1944 (which amends the Act of 1938), in respect of houses built to meet general needs, remains to be fixed by a Bill which is now before Parliament.

(c) It was £9 (£12 10s. in agricultural parishes) per house for 40 years.

(d) Housing (Financial Provisions) Act, 1938, §§ 2 and 3: see above, p. 534.

(e) Housing Act, 1936, § 110.

(f) Housing (Financial Provisions) Act, 1938, § 1.

Slum Clearance.—Grants in aid of slum clearance commenced in 1921, when the Government provided an annual sum of £200,000 for this purpose. The inadequacy of this amount led to the provisions of the Housing, etc., Act, 1923, under which the Minister was empowered to contribute one-half of the estimated annual loss likely to fall upon local authorities in carrying out re-housing schemes. The Housing Act, 1930, provided for a fixed annual grant (*g*) payable for forty years in respect of each person displaced by action taken under the Act. This introduced a new factor, since other housing grants had been based on the number of houses provided. The grant was, however, only payable subject to "special conditions" designed (*inter alia*) to secure that the tenants personally resided in the houses let to them. Moreover, the local authority was required itself to make a fixed annual contribution in respect of each house, the balance being covered by rents. The Housing Act, 1935, added further grants in respect of overcrowding and re-development, but partly reverted once more to basing the grants on the houses provided rather than on the number of persons displaced. It also provided that the Minister should at three-yearly intervals review the grants still being made in respect of new accommodation. The first of such reviews led to the passing of the Housing (Financial Provisions) Act, 1938, which then governed the grants payable (*h*).

The Housing (Financial Provisions) Act, 1938.—After the beginning of 1939 grants were payable in respect of each new house approved by the Minister which was provided by a local authority and was rendered necessary by displacement of persons occurring in connection with demolition or closing

(*g*) The amount was £2 5s. (£2 10s. in agricultural parishes).

(*h*) The reviews of contributions do not, of course, affect grants already being paid, which continue for their full term, but only made provision for the grants which would be payable in respect of new accommodation first provided within the succeeding three years. The next review was to have been made in 1941: Housing (Financial Provisions) Act, 1938, § 4. The rate of grant to be paid under the Act of 1938, as amended by the Housing (Temporary Provisions) Act, 1944, remains to be fixed by a Bill now before Parliament.

orders, clearance areas, or re-development plans, or required for the abatement of overcrowding. The grant was to be normally at the rate of five pounds ten shillings per annum for a period of forty years, but this amount might be increased where blocks of flats were erected on expensive sites, or in country districts where rents were low and the housing burden of the council was unduly heavy (*i*). In all cases in which grants were paid by the Minister the local authority was required to make an annual contribution from the rates (*j*). In addition, the county council was required to make a contribution of one pound per annum for forty years in respect of each house, for which an increased grant was made to a county district council by the Minister on account of low rents and heavy housing burdens (*k*).

Housing Accounts.—From this brief review of Government grants in aid of housing in its various forms, it will be at once apparent that local authorities are still receiving under a number of Acts a variety of housing grants based on diverse principles and subject to different sets of “special conditions.” To simplify the resulting accountancy and to give more elasticity in the administration of housing estates, often containing houses built under different Acts, the Housing Act, 1935, now replaced by the Housing Act, 1936, effected a consolidation of accounts and a unification of conditions. Henceforth housing accommodation provided by a local authority, as well as its financial resources, can be pooled and turned to the best advantage.

Every local authority is required to keep a “housing revenue account” (*l*), to which are to be credited all Government grants received under any of the Housing Acts, contributions, if any, from the county council, and the local authority’s

(*i*) Housing (Financial Provisions) Act, 1938, § 1.

(*j*) This was to be such a sum per annum for 60 years as was equivalent to one-half the Minister’s grant (*i.e.*, £2 15s.) for 40 years. This calculation was necessary because housing loans normally run for longer than 40 years : Housing (Financial Provisions) Act, 1938, § 6.

(*k*) Housing (Financial Provisions) Act, 1938, § 7.

(*l*) Housing Act, 1936, § 128.

statutory contributions from the rates. But many of the Government grants (*m*) are payable only for periods less than sixty years, while the loans raised by the local authority will normally run for not less than that period. To meet this difficulty the amount received in grants is re-calculated by reference to a period of sixty years, the balance, between the smaller sum so calculated and the actual sum received, being transferred from the housing revenue account to a suspense account called the "housing equalisation account" (*n*). The housing revenue account is debited with loan charges, outgoings and a sum transferred to a "housing repairs account" (*o*), designed to enable the cost of repairs to be spread evenly. The housing revenue account as it now stands will show a deficit, since the Government grants, the contributions, if any, from the county council and the statutory rate contributions of the local authority will not normally cover the cost of providing and maintaining the houses, some of which, indeed, may not be grant-aided at all. This deficit is the sum required to be raised by rents, which must accordingly be credited to the housing revenue account (*p*). If at the end of any year there is still a loss on the account, it must be made good by a further contribution from the rates (*q*), but a surplus, subject to the repayment of any such extra contribution made from the rates during the preceding four years, is to be carried forward to the next year's account.

At five-yearly intervals the housing revenue account is to be balanced. If a deficit is then found to exist, it must be made good by the local authority from the rates. If, on the other hand, a surplus appears, then, subject to the consent of the Minister, it may be dealt with in any one of three ways. First, it may be transferred in whole or in part to the housing repairs account; or, secondly, it may be carried forward; or, thirdly, it may be divided between the Minister and the local

(*m*) As well as the contributions from the county council.

(*n*) Housing Act, 1936, § 132.

(*o*) *Ibid.*, § 131.

(*p*) Housing Act, 1936, § 129.

(*q*) *Ibid.*, 8th Schd., para. 8.

authority in proportion to the sums which, in the preceding five years, each has contributed to the account (*r*).

Unification of Conditions.—All houses provided by a local authority are now held subject to a uniform set of “conditions” (*s*). These “conditions” prescribe that (a) preference shall be given to tenants who are occupying insanitary or overcrowded houses, or have large families, or are living under unsatisfactory housing conditions, (b) in fixing rents the local authority shall take into consideration rents ordinarily paid by persons of the working class in the locality, and (c) tenants shall be prohibited from sub-letting or assigning their houses or any part thereof without the local authority’s consent (*t*).

Rents.—It will be seen from the rules governing a local authority’s housing accounts, together with the “conditions” under which its houses are held, that there is no rule requiring the local authority to charge any specified rent for any particular house. So long as rents are fixed by reference to local conditions and the aggregate of the rents received from its houses serves to make its housing revenue account balance, the local authority has a wide discretion, which is assisted by the pooling of grants affected by the consolidation of accounts introduced by the Act of 1935. Indeed, the local authority may go further and charge differential rents or even grant rebates from rent, subject to such terms and conditions as it thinks fit (*u*).

Small Dwellings Acquisition.—In order to assist householders to purchase houses for their own occupation, the Small Dwellings Acquisition Act, 1899, empowered local authorities to advance money to the extent of four-fifths of the value of

(*r*) Housing Act, 1936, § 130.

(*s*) But, in addition, a number of houses, equal to the number in respect of which grants are paid on the basis of providing for the agricultural population, must be so reserved: Housing Act, 1936, § 85; Housing (Financial Provisions) Act, 1938, § 2.

(*t*) Housing Act, 1936, § 85.

(*u*) *Ibid.* The local authority may discriminate by taking into account the means of its tenants: *Leeds Corporation v. Jenkinson* [1935] 1 K.B. 168; Digest Supp.

a house to a person intending to reside therein, the value of which does not exceed one thousand five hundred pounds (*v*). Repayment with interest is to be made within thirty years (*w*). Conditions similar generally to those usually applied to mortgages are to be imposed, the house is to be kept in good sanitary condition and repair, and the borrower is required to live in the house (*x*). A register, open to public inspection without charge, is to be kept at the office of the local authority (*y*).

County councils and county borough councils may exercise the powers of the Act, and by passing a resolution to that effect an urban district council may also undertake that power. Expenses were chargeable upon the county rate and borough rate (*z*).

In some districts considerable sums have been advanced by local authorities under the powers of the Act.

(*v*) The proportion is now 85 per cent. The maximum value for the purposes of loans under the Acts was raised to £1,500 by § 6 of the Building Materials and Housing Act, 1945.

(*w*) § 1.

(*x*) § 2.

(*y*) § 8.

(*z*) § 9; now general rate.

CHAPTER XXII

TOWN AND COUNTRY PLANNING

Need for Public Control.—Haphazard development at the whim of each individual landowner has left as legacies to the present generation the problem of slum clearance and the unsightly arrangement of congested or unsuitable buildings in many of our towns. The control of building development was left to the caprice of the landowner. The owners of large town estates, realising that the value of their properties might be seriously reduced if orderly development and proper user were not insisted on, frequently ensured some degree of regular planning both as to the lay-out of streets and the type and position of the buildings erected. Moreover, the law afforded means by which such landowners could also safeguard their position by continuing to control the purposes for which the property was utilised. Thus, if a landowner sought to develop his property through the medium of building leases, he could retain an almost unlimited measure of control by insisting upon the lessees entering into covenants as to the user of the lands leased to them, and such covenants would run at law with the land under the doctrine in *Spencer's Case* (a), so as to bind all subsequent assignees of the leases. Again, if the landowner sought to permit development by sales of the freehold to builders and others, he could still enforce continuing limitations by imposing on the purchasers restrictive covenants binding the land in equity under the rule in *Tulk v. Moxhay* (b)—a principle, called into being by the Court of Chancery early in the nineteenth century, to meet the desire

(a) (1583) 5 Rep. 16a; 31 Digest 144, 2798.

(b) (1848) 2 Ph. 774; 40 Digest 313, 2667.

of landowners to retain this measure of control when faced with the building development around London.

In these ways some degree of planning and of control of the future user of land could be obtained, but the system, if such it can be called, suffered from four main defects. In the first place, it was in no form compulsory : what measure of planning or control should be imposed was left to the unrestricted discretion of the landowner. Secondly, it followed that the activities of one landowner in this direction, however admirable in themselves, might be doomed to failure through the carelessness or greed of his neighbours. In other words, simply because planning and control were left to the initiative of the individual landowner, the result was cramped by the fact that the boundaries of private estates limited the effects of any system of planning adopted by any one public-spirited or far-sighted owner. Thirdly, it was as a consequence inevitable that the results were on too small a scale and suffered from lack of co-ordination. Fourthly, the system looked to private gain and not to public advantage. A landowner introducing and maintaining anything like a scheme of planning and control did so solely because he realised that, by preserving public amenities, he was at the same time enhancing the value of his property.

In later years the importance of amenities from the point of view of the public has become apparent and has resulted in the introduction of town and country planning as a local government service. Only by employing local authorities to administer this service could the defects of the individualistic system of the common law and equity be overcome. Local authorities can be compelled by statute to undertake the task ; their areas are, or can be made, wide enough to embrace and co-ordinate the activities of a multitude of landowners ; they are not stopped by the artificial barriers created by the chance boundaries of private ownership ; and, lastly, their interest is public and not private. But it is important to understand at the outset the broad outlines of the evolution of these planning powers, for this leads to a realisation that the Town and

Country Planning Act of 1932 merely confers on local authorities powers derived from the practice of landowners. In this sphere, however, private enterprise was too cramped to be really effective, and powers, entirely comparable to those wielded by the individual owners of land, have been conferred in consequence upon local authorities. This is clearly illustrated by the steps which immediately led to the passing of the first Town Planning Act, and has become even more obvious in recent legislation and especially in the powers which have been conferred upon local planning authorities by the Town and Country Planning Act, 1944.

History.—In the early years of the present century there was considerable complaint that the development of land for building purposes, regulated only by the provisions of building bye-laws, was creating and extending social evils that should be prevented. It was accordingly urged that powers should be placed in the hands of the local authorities, as the only suitable instruments for the purpose, enabling them, in the general interests of the public, to control the development of land by private owners. The reformers were able to point to contemporaneous action which illustrated what they desired to accomplish. At that time so-called garden cities, of which the town of Letchworth was a conspicuous example, were being laid out and developed on novel lines. The method adopted was that under a species of benevolent despotism an estate of considerable extent, sufficiently large to form the area of a moderate sized town, had been acquired and its development had been planned with forethought, so that streets and roads had been laid down on lines and of widths consonant with the prospective requirements of local and through traffic and with the contours of the land. In addition, certain districts were “zoned” or earmarked to be used solely for specified purposes. Residential estates, the classes of houses whereon were defined, manufacturing areas, selected after regard had been had to railway and other traffic facilities, areas suitable for parks and open spaces, and the

allocation of sites for public buildings were efficiently controlled by this method of planning beforehand. Thus the development of the future town was carried out successfully by means of seemly and orderly pre-arrangement. Contrasted with this method the unsystematic growth of other towns, particularly in suburban areas, left much to be desired. To a large extent every landowner was allowed to develop his estate according to his own ideas, and without regard to the development of the neighbourhood as a whole. New streets were constructed that could not be brought into proper alignment with existing streets or roads, and little or no regard was given to the question of through traffic, which was becoming of increasing importance. Owners of small estates could hold up important road schemes and spoil projects for development of a district by the way in which they chose to utilise their properties, the result often being that buildings had subsequently to be purchased and demolished in order to enable an improvement in roads to be made. A further evil was that a whole district might be spoiled by the selfish or ignorant user of a single property. In a residential district, with houses of a good class and ample amenities, the owner of a particular property, if he could do so, as was often possible, without creating a nuisance at common law or under the Public Health Acts, might, for example, erect manufacturing works to the detriment of the amenities of the district.

Act of 1909.—In these circumstances appeal was made to Parliament for powers not only to prohibit the improper development, actual or contemplated, of estates in such a way as to cause injury or loss of amenities to the surrounding area, but also to control their future development, and to transfer to local authorities powers which had previously been exercisable by the landowners. The appeal to Parliament was favourably received, and in 1909, in accordance with a view then held that housing and town planning were closely associated with each other, the first general town planning powers were given in Part II of an Act primarily relating to the housing of the

working classes, *viz.*, the Housing, Town Planning, etc. Act, 1909.

The town planning provisions of the Act of 1909 authorised, but did not require, the council of any borough or urban or rural district to prepare a town planning scheme but only with reference to land in the course of development or which appeared likely to be used for building purposes. This did not include land already built upon. "Land likely to be used for building purposes" was defined to include land likely to be used for open spaces, roads, streets, parks, or recreation grounds, or for the purpose of executing work incidental to a town planning scheme. There were thus extensive tracts of land which were not within the scope of the Act. However, subject to these limitations, a local authority might make a scheme covering any land within or in the neighbourhood of its area. This power enabling a local authority to control the development of a neighbouring area was new. Any such authority might under the Public Health Acts acquire lands and construct works outside its district (*c*), but no power had previously been given to one authority to exercise governmental powers in a neighbouring area. A scheme extending into two or more local government areas might be carried out by a "responsible authority," which might be either a single local authority or a joint body constituted for the purpose of administering the scheme. For the preparation of a town planning scheme the authority of the Local Government Board (now the Ministry of Health) was required. It was requisite to satisfy the Board that there was a *prima facie* case for making the scheme. The authority might also be allowed to adopt a scheme proposed by landowners. Power was also given for inclusion in the scheme of other lands which would make the scheme more effective (*d*).

Act of 1919.—The Housing, Town Planning, etc. Act, 1919, removed the necessity for a local authority to obtain the

(*c*) See, *e.g.*, Public Health Act, 1875, § 27; see now Public Health Act, 1936, § 274.

(*d*) § 54.

consent of the Local Government Board before taking the first steps to prepare or adopt a town planning scheme, and at the same time recognised the increased importance of planning, by requiring the councils of boroughs and urban districts with a population of more than twenty thousand to prepare schemes. The Board was also given power to require any local authority to prepare a scheme.

Town Planning Act, 1925.—The town planning powers of these Acts were not exercised to any considerable extent. The subject was new, it was full of technical points of procedure, and before it was fully taken in hand the War put an end for a time to further progress. However, it came to be recognised that planning was not merely an adjunct to housing, and the first Act to separate the two subjects was passed in 1925. This was a consolidating measure which gave extended powers to local authorities, and re-imposed the obligation upon the council of every borough or urban district with a population exceeding twenty thousand to prepare and submit to the Minister before a specified date (*e*) a town planning scheme for all land within its area in respect of which a town planning scheme might be made under the Act.

Local Government Act, 1929.—The Local Government Act, 1929, in further pursuance of the policy of bringing the larger county authorities into active association with the administration of the statutory duties of the smaller authorities, empowered county councils to act jointly with other authorities in the preparation or adoption of town planning schemes (*f*). Experience had shown that in many cases satisfactory schemes could only be made when areas of considerable extent were taken as the units of treatment, and also that the procedure under the Acts required amendment. Protracted conferences took place between the Ministry of Health and representatives of local authorities, landowners and others interested, and the

(*e*) By a later Act fixed as the 1st January, 1934, or such later date before the 31st December, 1938, as the Minister might allow.

(*f*) § 40.

general lines of future policy were agreed. In the meantime various authorities had secured by private Acts powers relating to town planning, *e.g.*, certain boroughs had obtained permission to apply their town planning powers even to the built-up districts in their areas. Also the Surrey County Council in 1931 promoted a Bill and secured powers for planning its country areas, where no development was yet likely to take place.

Town and Country Planning Act, 1932.—It was obviously undesirable that the solution of this problem should be left to local effort or be directed in different areas on inconsistent lines, and in the result the Town and Country Planning Act, 1932, which repealed previous legislation on the subject, was passed. It finally removed the limitations contained in earlier enactments which confined schemes to certain types of land. Henceforth schemes might be made for rural as well as urban land, and in the latter case whether ripe for development or already built up.

A striking feature of the Act was the great degree of elasticity that was afforded. Authorities might combine, be dissolved and re-arranged in new combination, schemes might be made and subsequently varied, and authorities might, even after award of compensation had been made, withdraw or modify the provisions of the schemes which gave rise to the claim for compensation (*g*). The control to be exercised by the Minister was extensive. The reason for this was the great difficulty in setting out, in general legislation of this nature, detailed provisions which required infinite variation in their application to different parts of the country, and indeed to different districts in the same county or borough. Such an Act could only be made effective by laying down general principles, leaving the details to be filled in by the local authority under the control and subject to the determination of the Minister (*h*).

(*g*) § 24.

(*h*) The matters with which the Act deals, including the preparation and operation of planning schemes, are referred to below, at pp. 552 to 565.

Changes in Governmental Responsibility.—Between 1932 and the outbreak of war in 1939 there were no changes in planning legislation. But in 1942 it was decided to separate the planning functions of the Minister of Health from his other functions and the Minister of Works Act, 1942, accordingly provided for the transfer to a Minister of Works and Planning of all the functions exercisable by the Commissioners of Works, and all those exercisable by the Minister of Health under the Town and Country Planning Act, 1932, except those exercisable under § 32 of that Act, the transfer to be effected by Order in Council. By the Ministry of Works and Planning (Transfer of Powers) (No. 1) Order, 1942 (*i*), the powers of the Minister of Health under the Town and Country Planning Act, 1932 (*j*), were transferred to the Minister of Works and Planning. Then the next step was taken by the passing of the Minister of Town and Country Planning Act, 1943, which provided for the establishment of a separate Ministry of Town and Country Planning, and for the appointment of a Minister “charged with the duty of securing consistency and continuity in the framing and execution of a national policy with respect to the use and development of land throughout England and Wales (*k*), and for the transfer to him of the planning functions of the Minister of Works and Planning (*l*).

Town and Country Planning (Interim Development) Act, 1943.—Almost the first Act of the new Minister was to introduce a Bill which became law under the title of the Town and Country Planning (Interim Development) Act, 1943, and is described as “An Act to bring under planning control land which is not subject to a scheme or resolution under the Town and Country Planning Act, 1932, to secure more effective control of development pending the coming into operation of

(*i*) S. R. & O., 1942, No. 1313.

(*j*) Except those exercisable under §§ 32, 51 and 55.

(*k*) § 1.

(*l*) Minister of Town and Country Planning (Transfer of Powers) (No. 1) Order, 1943 (S. R. & O., 1943, No. 206).

planning schemes," and for purposes connected with such matters.

The first of these objects was achieved by providing that after the expiry of three months from the passing of the Act (*i.e.* on October 22, 1943) all land not already the subject of a scheme or of a resolution to prepare or adopt a scheme would be subject to a resolution to prepare such a scheme, deemed to have been duly passed by the local authority for the district in which the land was situated and to have been approved by the Minister and to have taken effect accordingly (*m*). Thus planning control was extended to the whole of England and Wales.

The Act also made a number of amendments in the law relative to interim development control (*n*).

Town and Country Planning Act, 1944.—The primary purpose of this Act is to confer upon local planning authorities new and positive powers for the re-development of towns, by means of large-scale public acquisition of land and by securing that land so acquired is brought into use for its appropriate purpose, including power for the authority, if need be, themselves to carry out any necessary development. The Act includes provisions—

- (1) for the re-development of areas of extensive war damage, for the acquisition of land for that purpose, and for the payment of grants towards the expenses of acquisition and clearance (*o*) ;
- (2) for the acquisition of land for certain planning purposes, including the re-development of areas of bad layout and obsolete development, and imposing an obligation to purchase war-damaged land where permission to develop is refused (*p*) ;
- (3) granting a variety of powers to local planning authorities in relation to land acquired or appropriated for the purposes just mentioned (*q*) ;

(*m*) § 1.

(*p*) §§ 9-11.

(*n*) See below.

(*q*) §§ 19-30.

(*o*) §§ 1-8.

- (4) relating to a number of different matters, including the furnishing of information to the Minister (*r*), interim development control (*s*), the establishment of joint planning committees (*t*), the application of planning schemes to agricultural buildings (*u*), the designation and preservation of buildings of special architectural or historic interest (*v*), the extension as respects the war period of protection for existing buildings and uses (*w*), and the grant under planning schemes during the war period of consent to develop with effect for a limited period (*x*); and
- (5) dealing with the payment of compensation in connection with the acquisition of land for public purposes (*y*).

The Act introduces two important principles to planning legislation. It provides, in the first place, that the local planning authority may not, in general, sell land which it acquires in connection with re-development schemes under the Act, or grant leases for longer than ninety-nine years (*z*). In other words, it places local authorities in a similar position to the landowner before planning control existed, with this exception, that the local authority is now bound to administer its estates according to modern planning principles. Retention of ownership, however, will enable much closer control to be exercised than under the general planning powers.

Secondly, where during the five years following the commencement of the Act a local authority buys land compulsorily for any public purpose, compensation is to be ascertained by reference to prices current on March 31, 1939 (*a*).

Licensing Planning (Temporary Provisions) Act, 1945.
—The Licensing Planning (Temporary Provisions) Act, 1945, makes temporary provision with regard to justices' licences in war-damaged areas and certain areas related to war-damaged

(*r*) § 31.

(*v*) §§ 42 and 43.

(*z*) § 19 (5).

(*s*) §§ 32-39.

(*w*) § 45.

(*a*) § 57.

(*t*) § 40.

(*x*) § 46.

(*u*) § 41.

(*y*) §§ 57-62.

areas. It applies to areas which may be declared by the Secretary of State to be licensing planning areas (*b*), and provides for the establishment of a licensing planning committee for each such area (*c*), which is to review the circumstances of its area and may formulate proposals for the removal and surrender of licences (*d*).

(1) The making of the Scheme.—The Act of 1932, as amended, may be considered for purposes of elucidation in two aspects, first, the making and completion of a scheme, and, secondly, the putting into operation and enforcement of a scheme. The local authorities appointed to undertake the first duty are the councils of county boroughs and county districts. The council of a county district may relinquish its powers in favour of the county council or a number of county councils. Also, two or more authorities, including county councils, may appoint a joint committee delegating to it any powers under the Act, save that of borrowing money or levying a rate, connected with the preparation of a planning scheme or with any matter preliminary to the preparation of a scheme, or the preparation of a varying or a supplementary scheme (*e*).

Further, the Minister of Town and Country Planning may by order constitute such a joint committee, with the proviso that, if all the authorities concerned do not agree, a local inquiry must be held before the order is made (*f*). Such an order may be made without the request of any of the authorities concerned (*g*). The Minister may also alter the constitution of a joint committee, so as to enable a county council or local authority, whose district adjoins that of any constituent authority, to be represented on the joint committee (*h*), and may even dissolve the committee (*i*). The control of interim

(*b*) § 1.

(*c*) § 2.

(*d*) §§ 4 and 5.

(*e*) Town and Country Planning Act, 1932, § 3, and Town and Country Planning Act, 1944, § 40.

(*f*) Town and Country Planning Act, 1932, § 4.

(*g*) Town and Country Planning (Interim Development) Act, 1943, § 9 (3).

(*h*) Town and Country Planning Act, 1932.

(*i*) Town and Country Planning (Interim Development) Act, 1943, § 9 (4).

development may also be vested in a joint committee by means of an order made by the Minister (*j*).

Objects of the Scheme.—The general object, which the Act is intended to promote, is to ensure the control of the development of land, whether with or without buildings thereon, to secure proper sanitary conditions, amenity and convenience, to preserve existing buildings or other objects of architectural, historic or artistic interest, and places of natural interest or beauty, and generally to protect existing amenities whether in urban or rural districts (*k*). A further object for which a scheme may be made is the rendering of the whole or any part of the area to which the scheme applies less vulnerable to air-raids (*l*).

Planning Schemes.—These objects are to be attained by the making of a scheme containing detailed regulations governing the development and user of the planned area, and, inasmuch as the scheme is the pivot on which the Act turns, it may be pointed out what is meant by a scheme.

A scheme is contained in a document, written or printed, which is accompanied by maps, and sets forth in great detail various proposals for the planning of a specified area. The Second Schedule to the Act enumerates the matters which are to be dealt with by schemes. These include such matters as streets, buildings, open spaces, sites for places for religious worship, sites for aerodromes, disposal of refuse, sewerage, lighting and water supply. The user to which land or buildings may be put, the orderly and economical development of land, the prohibition of building, the space about buildings, the number of buildings and the external appearance of buildings may all be regulated by the scheme (*m*). The typical scheme thus makes provision for the reservation of land for various public purposes, provides a code of regulations for the lay-out and construction of streets and the imposition of building lines,

(*j*) Town and Country Planning (Interim Development) Act, 1943, § 9 (1).

(*k*) Town and Country Planning Act, 1932, § 1.

(*l*) Civil Defence Act, 1939, § 70.

(*m*) Town and Country Planning Act, 1932, §§ 11 and 12.

defines use and density zones, and contains miscellaneous provisions for securing general amenity.

Effect on Private Property.—It is important to observe that the Act of 1932 introduced a new principle in legislation affecting private property. Theretofore such legislation had been based upon the right of the community to over-ride the rights of the landowner when some public need arose—as, for example, when land was required for the purpose of some utility service, in which case compulsory purchase under the Lands Clauses Acts might be made to apply, or when public health was or might be affected adversely—and for such cases the Public Health Acts and Housing Acts provide. But before town planning legislation was passed there was no statutory enactment authorising compulsion or constraint to be exercised over landowners for the sake merely or chiefly of preserving amenity. The power given by the Public Health Act, 1875 (*n*), to regulate by bye-laws the construction of buildings was based upon the need for securing stability of buildings and providing safeguards against risk of fire : it had no relation to questions of amenity.

Further, the Act of 1932 imposes many limitations upon user, for which no compensation is payable. The provisions of § 12 of the Act enable the authority (*inter alia*) to regulate the size, height, design and external appearance of buildings, and, although a right of appeal to a court of summary jurisdiction or a tribunal constituted under the scheme is given against any decision of the authority when exercising this right of regulation, no compensation is payable to the owner in the event of the decision not being successfully appealed against.

Procedure in making the Scheme.—The general principle of the Act is to provide for the making of a planning

(*n*) Public Health Act, 1875, § 157. See now, however, Public Health Act, 1936, § 61, which, in view of the number of cases in which local Acts had extended the scope of building bye-laws, and of the fact that amenity can now be controlled under planning powers, has omitted these restrictive words. See above, p. 500.

scheme by a local authority or joint committee, and, after the scheme has come into operation, to permit the provisions of the scheme to be enforced. Primarily, these latter provisions will relate to the future development and user of land, but it may be found that already land has been developed or is being used in a way inconsistent with the provisions of the scheme. In such a case the authority responsible for enforcing the scheme may compel the landowner to conform with its provisions, subject to the payment of compensation for any "injurious affection" and subject to the recovery by the authority of three-quarters of the increased value of the land resulting from the operation of the scheme (o). Now it is obvious that the actual preparation of the scheme will be a lengthy and complicated process and that, after the local authority has determined to prepare a scheme, a considerable time will have to elapse before it can come into operation. It is therefore necessary for the law to make provision for preventing landowners during this interval from acquiring vested rights which can only be over-ridden, when the scheme finally comes into operation, by the payment of possibly heavy compensation.

Resolution to prepare the Scheme.—The requisite procedure was formerly complicated and was shortly as follows :

- (a) The authority passed a resolution deciding to prepare a scheme with respect to land within or in the neighbourhood of its own district. Alternatively, the resolution might be to adopt a scheme prepared by landowners.
- (b) The resolution before becoming effective had to receive the approval of the Minister, who might vary the extent of land to be included in the scheme.
- (c) In the case of land already built upon the Minister might not approve the resolution unless he was satisfied that developments were likely to take place, or that buildings of special interest were comprised in the scheme, or

(o) Town and Country Planning Act, 1932, §§ 18 to 24. The claim by the authority to recover a proportion of the increased value is spoken of as a claim to "betterment."

that the general object of the scheme would be better secured by its inclusion.

- (d) In the case of land unbuilt upon and not in the course of development, the Minister had to be satisfied that the land is so situated as to make its inclusion in the scheme expedient or that it comprised objects or places of natural interest or beauty (*p*).
- (e) The resolution having been duly passed and approved by the Minister, notice thereof was published in the *London Gazette*, and notices were served upon the occupiers and owners of hereditaments in the area to which the resolution applied (*q*).

However, since October 22, 1943, all land not already the subject of a scheme or resolution has been subject to a resolution deemed to have been duly passed by the local authority for the district in which the land is situated and to have been approved by the Minister and to have taken effect accordingly. In the case of such land it was not necessary to publish or serve any notices (*r*).

Effect of the Resolution.—The resolution on October 22, 1943, in the case of land not previously subject to a resolution, has an important influence, for, in general, the date on which the resolution became effective is conclusive as to the validity of any claim to compensation. When the scheme is finally made and approved and has become operative, the authority responsible for enforcing it is armed with very effective powers for compelling landowners to make the user of their lands conform to the provisions of the scheme (*s*); and these powers are exercisable whether the buildings or user were in existence before, or only came into existence after the date on which the original resolution to prepare a scheme became effective. But when the question of compensation comes to be considered, a

(*p*) Town and Country Planning Act, 1932, § 6.

(*q*) *Ibid.*, § 7.

(*r*) Town and Country Planning (Interim Development) Act, 1943, § 1.

(*s*) Town and Country Planning Act, 1932, § 13; *e.g.*, powers to remove, pull down, or alter buildings, to execute works and to prohibit user inconsistent with the scheme.

vital difference appears between the position of a landowner, whose buildings or user existed before the date on which the resolution became effective, and one whose buildings or user only came into existence thereafter. The former may recover compensation, the latter, in general, may not (*t*). The date on which the resolution to prepare a scheme became effective crystallises the rights of the landowner; so far as before that date he developed or used his land in a manner inconsistent with the scheme, he may claim compensation: but he is not permitted to acquire vested rights, carrying a right to compensation, by development or user only commencing after that material date.

Hence the law made the careful provisions, already referred to, for informing landowners of the coming into effect of a resolution to prepare a scheme. But, as future purchasers of the land might similarly be affected, provision was also made for the registration of such resolutions as "local land charges" in registers maintained by the local authorities (*u*).

Similarly, provision was made requiring appropriate entries to be made in the registers relating to land which became subject to a resolution on October 22, 1943 (*v*).

The resolution to prepare a planning scheme has been judicially described as designed

"not so much for the purpose of imposing restrictions as of preventing unreasonable claims for compensation being made by persons buying up land subject to the proposed scheme" (*w*).

Interim Development.—The resolution in itself formerly did not impose any restrictions upon the user of the land to which it applies; it merely warned the world at large that any activities undertaken on that land, during the interim between

(*t*) Town and Country Planning Act, 1932, §§ 18, 19, 20, and 53.

(*u*) Land Charges Act, 1925, § 15, as amended by Law of Property Amendment Act, 1926, Schd. A scheme when it becomes operative is similarly registered.

(*v*) Local Land Charges Amendment Rules, 1943 (S. R. & O., 1943, No. 1532/L. 32).

(*w*) *Per* Lord Hanworth M.R. in *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379, pp. 391-392; 40 Digest 82, 634.

the dates on which the resolution became effective and the scheme comes into operation, would not rank for compensation if they should later be found to be inconsistent with the scheme. If the matter were left like this, however, it is obvious that the resolution would in the majority of cases amount to a practical prohibition of any alteration in the user of the land pending the coming into operation of the scheme. Consequently the Act as amended by the Town and Country Planning (Interim Development) Act, 1943, and the Town and Country Planning Act, 1944, contain provisions enabling the landowner to develop his land in the interim, on terms which ensure to him either that the development will not conflict with the provisions of the ultimate scheme, or that, if it does, he will nevertheless be entitled to compensation.

This is effected by means of interim development orders to be made by the Minister. He is required to make a general order with respect to the interim development of land within the areas proposed to be affected by a scheme (x). He may also make special orders with respect to the interim development of land in a particular area. The interim order may permit the development of land to proceed either unconditionally or subject to specified conditions, or may empower any authority to permit such developments. In the latter case the authority may grant or refuse an application for permission to develop land. If it refuses the application it must state its reason for so doing, and a final appeal against its decision may be made to the Minister, who in certain circumstances may require the local authority to purchase land which is affected by the appeal. Prior to the coming into operation of the Town and Country Planning (Interim Development) Act, 1943, a person, wishing to develop his land pending the coming into operation of the scheme in such a manner as still

(x) Town and Country Planning Act, 1932, § 10; Town and Country Planning (General Interim Development) Order, 1933 (S.R. & O., 1933, No. 236). The Order of 1933 has been revoked and replaced by the Town and Country Planning (General Interim Development) Order, 1945 (S. R. & O., 1945, No. 349), which has itself been revoked and replaced by the Town and Country Planning (General Interim Development) Provisional Order, 1946, dated Feb. 1, 1946.

to preserve his right to compensation, had, in practice, to apply to the local authority which had, subject to an appeal to the Minister, the right to grant or refuse the application according as it was or was not in conformity with the proposed scheme. But until that time a refusal to grant approval under the interim development order did not make the development illegal or prevent it from taking place—it merely settled that no compensation would be payable if the development should subsequently be found to be inconsistent with the provisions of the scheme when they come into operation.

Now, however, the Town and Country Planning (Interim Development) Act, 1943, has made a number of changes in the law. In the first place the interim development authority may postpone the consideration of an interim development application either generally or for a specified period, unless the applicant can show that the proposed development would be carried out immediately if the application were granted. A right of appeal is given to a court of summary jurisdiction and, in addition, the Minister may, in special circumstances, give directions requiring the authority to come to an immediate decision. Furthermore, unless a decision has been notified to the applicant within two months, the application is deemed to have been refused, but the authority is still under a duty to consider all applications with reasonable dispatch and to give notice of its decision (y).

Secondly, the authority is now authorised to give consent to development for a limited period only, and the period of such consent may be extended on application made at any time before its expiration (z).

Thirdly, at any time before a scheme comes into operation an authority may, with the consent of the Minister, revoke or modify a consent previously given if, having regard to the provisions proposed to be contained in the scheme, it appears that the development should not be carried out or completed, or should be varied; and the authority may make a contribu-

tion to any person whose property is injuriously affected thereby (a).

Fourthly, the authority is now given specific power to enforce interim development control instead of having to wait until the scheme comes into operation. Where development takes place in contravention of an interim development order or of consent given under an order, the authority remove or pull down a building or work or may prohibit the use of land and, where necessary, reinstate it. An appeal lies to a court of summary jurisdiction. The cost of taking action may be recovered summarily from the developer who, if he has failed to appeal, may not dispute the validity of the action. Penalties are prescribed for non-compliance with an order under the section. The same rules apply where consent has been given for a limited period and the period expires before the scheme comes into operation, as if the development had been carried out at the end of the period (b).

Fifthly, the Minister is enabled to require that any application, or any class or description of application, shall be referred to him for decision, and his decision is deemed to be a decision given on appeal from a decision of the authority who may, however, make a contribution under § 10 (4) of the Act of 1932 (c).

Provision is also made for the payment of compensation in certain circumstances for expenditure on the part of a developer which is rendered abortive either by the coming into force of the Act or coming into force of a resolution taking effect after that date (d).

Finally, the authority is empowered, pending the coming into operation of a provision in a scheme relating to the preservation of trees or woodlands, to make interim preservation orders for the same purpose, with the approval of the Minister, but subject to the payment of compensation for injurious affection (e).

The Town and Country Planning Act, 1944, also contains provisions relating to interim development—

(a) § 4.

(d) § 7.

(b) § 5.

(e) § 8.

(c) § 6.

- (1) applying to development proposed to be carried out by an interim development authority or an authority responsible for the enforcement of any provisions of a planning scheme (*f*) ;
- (2) enabling an existing planning scheme to be suspended and interim development control to be re-introduced (*g*) ;
- (3) relating to the control of interim development by statutory undertakers (*h*) ;
- (4) enabling, by means of an interim development order, permission to be excluded in particular areas or particular cases (*i*) ; and
- (5) giving additional powers enabling certain enactments to be suspended by means of an interim development order (*j*).

Thus it may be seen that, by means of interim development orders, the proper development of land, on lines conformable to, and not in conflict with, the proposals of the scheme, may be allowed without waiting for the completion of all the details of a scheme affecting perhaps a very large area.

So far we have dealt with the coming into effect of the local authority's resolution to prepare or adopt a scheme, and have seen its importance and the procedure provided for sanctioning interim development.

Preparation of the Scheme.—The next stage is obviously concerned with the preparation of the scheme (*k*). This will involve surveys, discussions with parties affected, and decisions upon the policy to be adopted in regard to the future development and user of the land within the area. The process must almost inevitably be a lengthy one, and the law lays down no provisions governing the conduct of a local authority engaged in the delicate tasks of negotiation which the preparation of the

(*f*) § 32.

(*g*) § 33.

(*h*) §§ 34-37.

(*i*) § 38.

(*j*) § 39.

(*k*) Many details of procedure are governed by regulations made by the Minister under the Town and Country Planning Act, 1932, § 37 ; Town and Country Planning Regulations, 1933 (S.R. & O., 1933, No. 742).

scheme must involve. When, however, this stage is completed, the law again takes control and prescribes a rigid course of procedure to be followed in order to turn the draft scheme into a fully operative one. These steps may also be tabulated :

- (a) The draft scheme must be formally adopted by the local authority or joint committee at a specially summoned meeting.
- (b) It must next be submitted to the Minister of Health, who may give it his approval, with or without modifications, but, if he proposes to make any modifications, he must, on the request of the local authority or joint committee, first hold a local inquiry (*l*).
- (c) When the scheme has been approved by the Minister, it must still pass through a parliamentary stage. The Minister must cause it to be laid before both Houses of Parliament. In general it is sufficient for the scheme to lie on the tables of the Houses for twenty-one days without being disapproved, but, if the scheme seeks to suspend certain statutory provisions or to interfere in certain ways with existing commons, open spaces or allotments, it needs the positive approval of Parliament by a simple resolution in each House (*m*).
- (d) When parliamentary approval in either form, as the case may be, has been obtained, the local authority or joint committee must publish a notice of this fact in the local press and serve notices upon persons affected. Six weeks thereafter the scheme comes into operation, unless in the interval proceedings have been started in the High Court by a person aggrieved to test the validity of the scheme or any of its provisions. A right to appeal to the courts is, however, not given in respect of a provision in a scheme which was the subject of a positive resolution of approval in each House of Parliament (*n*).

(*l*) Town and Country Planning Act, 1932, § 8.

(*m*) Town and Country Planning Act, 1932, 1st Schd., Part I, paras. 2 and 3; 3rd Schd., Part II, para. 4.

(*n*) *Ibid.*, 1st Schd., Part II.

(2) **Enforcement of the Scheme.**—We come now to the second stage : the scheme has become operative and it remains to enforce it and see that its provisions are not infringed. We have seen that in the making of schemes local authorities or joint committees are employed, but the enforcing of a scheme which has become operative is imposed upon the “responsible authority” defined in the scheme itself, which may be the council of a county, county borough or county district or a joint body specially constituted for the purpose (*o*).

It is as yet early to say how in practice the enforcement of schemes will operate, but some indication may be given of the types of duties which will fall to be dealt with by the responsible authority. First may be put the exercise of the drastic powers contained in § 13 of the Act, permitting the responsible authority to require land, already developed or used for purposes inconsistent with the scheme, to be put into a state conforming to its provisions, and in this connection claims for compensation or betterment may arise. Secondly, the responsible authority must watch over the development of the planned area and see that the provisions of the scheme are not infringed. If any such infringement should occur, the enforcing provisions will also be available to deal with it. Thirdly, the responsible authority will control new development. The scheme, in order to prevent irregular development, may prohibit or restrict building operations on specified land until a “general development order” permits them to take place. Such orders are to be made by the responsible authority from time to time with the approval of the Minister, and an appeal to the Minister is given to the person aggrieved by the authority’s refusal to make a general development order (*p*). But even before a general development order is made, the responsible authority may give permission for an individual to build, and an appeal lies to the Minister from the refusal of such permission (*q*). If in any such case the responsible authority refuses to make a general

(*o*) Town and Country Planning Act, 1932, § 11.

(*p*) *Ibid.*, § 15.

(*q*) *Ibid.*, § 16.

development order or to grant permission to build, and its action is upheld by the Minister on any appeal to him, it is made illegal to commence building operations on the land in question, and the enforcing provisions of § 13 may be utilised to compel compliance with the law. In this respect the controlling activities of the responsible authority under an operative scheme formerly differed from those of a local authority or joint committee acting under an interim development order, for in this latter case refusal of permission merely affected the ultimate right to compensation when the scheme should have become operative. Now, however, § 5 of the Town and Country Planning (Interim Development) Act, 1943, gives similar powers of control even during the interim development period.

Fourthly, the responsible authority may have power under the scheme to regulate the design or external appearance of buildings, though in such cases an appeal will lie from its refusal to approve either to a court of summary jurisdiction or to a special tribunal set up for the purpose by the scheme itself (*r*), or to the Minister (*s*). Fifthly, the responsible authority may purchase land for the purposes of the scheme, as, for instance, where orderly development is impeded by reason of the land being held by different owners in plots which are of inconvenient size or shape (*t*). Sixthly, where the scheme specifies that land is to be protected in respect of advertisements, the responsible authority may, subject to an appeal to a court of summary jurisdiction, require certain classes of advertisements or hoardings, which seriously injure the amenity of that land, to be removed (*u*).

Powers of the Minister.—The position of the Minister of Town and Country Planning in relation to procedure under the Act is intimate and detailed. As has already been shown, he is concerned in all proceedings up to the completion of the scheme, and he is the appellate authority in cases of disputes of various kinds. He is responsible for issuing various general orders and regulations and also for special orders, such as interim develop-

(*r*) Town and Country Planning Act, 1932, § 12.

(*s*) Town and Country Planning Act, 1944, § 44.

(*t*) Town and Country Planning Act, 1932, § 25.

(*u*) *Ibid.*, § 47.

ment orders. To assist in the promotion or extension of garden cities, he is empowered, with the consent of the Treasury and after consultation with other Departments, to acquire land, by agreement or compulsorily, which a local authority or a garden city association with available funds requires for such purposes, and to vest such land in the local authority or association (*v*). He may call upon a backward authority to prepare a scheme, and on its default he may act in its place and at the cost of the authority, and himself make and carry out a scheme. If the defaulting authority is a rural district council or the council of an urban district with a population of less than twenty thousand, the Minister may empower the county council to act. Further, if a scheme has come into force and the responsible authority fails to enforce it efficiently, the Minister may make an order, enforceable by order of *mandamus*, requiring the authority to remedy its default, or he may himself carry out the scheme or, in such cases as above, empower the county council to act (*w*).

Redevelopment Areas and Compensation under the Act of 1944.—The provisions of Part I of the Town and Country Planning Act, 1944, introduce a new principle into planning legislation, the principle that the redevelopment of an area which, either because of extensive war damage or of bad layout and obsolete development, requires to be laid out afresh and redevelopment as a whole, shall be carried out by the local planning authority. The redevelopment of such areas, whether areas of extensive war damage (*x*) or areas of bad layout and obsolete development (*y*), involves :—

- (1) the preparation of a plan or planning proposals ;
- (2) the acquisition of land by agreement or compulsorily (*z*) ;
- (3) the payment of compensation where land is acquired compulsorily (*a*) ;
- (4) in some cases the appropriation of land (*b*) ;
- (5) the clearing of sites preparatory to development (*c*) ;
- (6) the extinguishment of public highways (*d*) ;

(*v*) Town and Country Planning Act, 1932, § 35.

(*w*) *Ibid.*, § 36.

(*x*) § 1.

(*y*) § 9.

(*z*) §§ 2, 3, 4, 9, 10, 12, 14.

(*a*) §§ 13, 14, 18.

(*b*) §§ 14, 19.

(*c*) § 20.

(*d*) § 23.

- (7) the extinguishment of private ways and easements and payment of compensation therefor (e) ;
- (8) Special arrangements with statutory undertakers regarding the removal of their apparatus, etc., and arrangements with the Postmaster-General regarding his apparatus (f) ;
- (9) the rehousing of displaced persons in advance of displacements (g) ;
- (10) redevelopment by local planning authorities and by other persons (h) ;
- (11) the disposal of land for purposes of redevelopment (i) ;
- (12) the construction of new highways and the improvement of existing highways (j) ;
- (13) in the case of the redevelopment of areas of extensive war damage in towns which were formerly overpopulated and congested, the provision of new communities outside the area of the local planning authority to relocate population and industry (k) ; and
- (14) many incidental and consequential matters.

The Act is not required to be construed as one with the Act of 1932 and is to be regarded as a major Town and Country Planning Act containing a code complete in itself in so far as it relates to the redevelopment of areas. Part I, as is clearly apparent, is of a highly specialised nature and is, of course, of the greatest importance to those towns which have suffered severe damage owing to the war.

In addition to the redevelopment provisions just described and to the various planning provisions already mentioned, Part II of the Act amends the law relating to the payment of compensation, not only where land is compulsorily acquired for the purposes of Part I, but in all cases where land is acquired by a government department or by a local or public authority, by providing that compensation for an interest in land, for severance or other injurious affection, and for injurious affection due to the execution of works on land acquired, shall, for a

(e) §§ 22, 24. (f) §§ 23, 25. (g) § 30. (h) §§ 19, 20.
 (i) § 19. (j) § 21. (k) § 12.

limited period of time (five years from November 17, 1944), be assessed by reference to prices current at March 21, 1939 (*l*), a supplement being authorised in the case of owner-occupiers (*m*), and in respect of improvements carried out after March 31, 1939, but before the date of the service of the notice to treat (*n*). Special provisions are also made regarding the assessment of compensation for the purchase of land valued under the War Damage Act, 1943 (*o*). The final section of this Part (*p*) makes provision with regard to the rate of interest payable where entry is made before the payment of compensation.

Distribution of Industry Act, 1945.—Whilst not primarily a planning Act, the Distribution of Industry Act, 1945, is of importance to all concerned with town and country planning. Its source may be traced to the Report of the Royal Commission on the Distribution of the Industrial Population (*q*), and to the White Paper on Employment Policy which was presented by the Minister of Reconstruction to Parliament in May, 1944 (*r*). The Act, which repeals the Special Areas (Development and Improvement) Acts, 1934 and 1937 specifies (*s*) a number of development areas in which the Board of Trade is authorised to stimulate and develop industry by the acquisition of land and the erection of buildings. The Board is also authorised, with the consent of the Treasury, to make loans to trading or industrial estate companies for the same purpose (*t*) and enables any Minister of the Crown, with similar consent, to make grants or loans for improving, in development areas, any basic service (transport, power, lighting, heating, housing, health and other services) (*u*). Similar power is given to the Treasury to grant financial assistance to industrial undertakings in development areas (*v*). The Act also contains provisions for dealing with derelict land in development

(*l*) § 57.(*p*) § 62.(*s*) § 1 and Schd. I.(*t*) § 2.(*m*) § 58.(*q*) Cmd. 6153/1940.

The list may be altered from time to time : § 7.

(*u*) § 3.(*n*) § 59.(*o*) § 61.(*r*) Cmd. 6527/1944.(*v*) § 4.

areas (w), and requires buildings and works carried out by the Board of Trade to conform with planning schemes (x).

A form of control is established over the erection of new industrial buildings by requiring persons intending to erect such buildings to give prior notice to the Board of Trade (y), but the Act provides no specific power enabling the Board to direct an industrial undertaking from one place to another.

The Future.—Except in minor details, legislation has not yet been introduced to give effect to any of the recommendations in the Report of the Scott Committee on Land Utilisation in Rural Areas (2), nor has any action been taken to settle what has always been the most difficult problem relating to town and country planning, namely compensation and betterment, though the subject has been exhaustively considered in the Uthwatt Reports on Compensation and Betterment (a) and the White Paper on the Control of Land Use (b). Legislation on this subject is essential before it can become possible to deal with the many problems inherent in the preparation and operation of a planning scheme, and at the present time the code of law relating to town and country planning may be regarded as incomplete.

(w) § 5. (x) § 6. (y) § 9. (2) Cmd. 6378/1942.
(a) Interim Report : Cmd. 6291/1941. Final Report : Cmd. 6386/1942.
(b) Cmd. 6537/1944.

CHAPTER XXIII

HIGHWAYS, STREETS AND BRIDGES

Introduction.—The needs of communication have from early times necessitated the provision and maintenance of thoroughfares for the passage of men, beasts and vehicles. When more than a green lane became necessary, the maintenance of highways in a proper state of repair was a service obviously best provided by some form of co-operative enterprise, and gradually local authorities were charged with the duties of performing such maintenance. As a corollary, later powers of creating new highways were also conferred by statute. The increase of traffic on roads, and particularly in modern times the introduction of motor traffic, has in turn led to the transfer of highway functions to the Central Government in the case of the more important national routes for through traffic (*a*). Further, the licensing of vehicles and their drivers, while formerly a duty of local authorities, has, in the case of long-distance passenger transport and of goods vehicles, been transferred to specially constituted Traffic Commissioners. The licensing of other vehicles and of drivers, however, is still the duty of the councils of counties and county boroughs (*b*).

Highways, however, at any rate in urban areas, came to assume a new importance when public health legislation began to appear. The proper provision of streets in towns, their lay-out, width and construction as well as the orderly arrangement of the buildings along their margins, are matters which

(*a*) Trunk Roads Act, 1936.

(*b*) See below, p. 773.

at first were regarded as concerned rather with the dictates of a sound system of public health than with the requirements of traffic, though later experience has shown the necessity of such control from a traffic point of view. Hence legislation, such as the Public Health Act, 1875, contains special provisions for securing that all streets, whether technically highways or not, shall be so arranged and constructed as to further and not to retard the attainment of healthy conditions. Consequently, also, special provisions exist for making such streets into public highways.

Lastly, the law about bridges has peculiarities of its own. At a time when organisation for the maintenance of roads was not yet necessary, the very nature of bridges and their essential character made desirable special rules of law governing them. At a later time the expensive work of bridge building and maintenance singled them out for special treatment.

From this brief sketch the complex nature of the law relating to highways, streets and bridges will be at once apparent. Convenience dictates that the subject should be split up into its component parts, and that the licensing of drivers and vehicles should be omitted from further consideration in this place. We shall discuss, then, what is a highway, how it comes into existence and how it may cease to be a highway, the maintenance of highways and the authorities responsible for this work, the provisions of public health legislation governing the construction of streets and how such streets may become highways, and, lastly, the peculiar law relating to bridges.

Section I.—THE NATURE OF A HIGHWAY

Definition of Highway.—A highway is characterised in law by the fact that the public as a whole and without distinction have a right of passing and re-passing over a defined strip of land set apart for that purpose. There is no necessity for the highway also to amount to a thoroughfare; a *cul-de-sac* may in law be a highway over which the public right of passage

extends (c). But the right of passage itself may be subject to limitations, or, in other words, the term "highway" includes many different public rights of using land, their common characteristic being that they all amount to rights of passage and re-passage exercised by the public without distinction of person. Thus highways include not only public carriage roads, but also bridleways, driftways and footpaths, for, as Lord Holt observed (d),

" 'Highway' is the *genus* of all public ways, as well cart, horse, and footways."

In another sense, too, highways may be restricted. As will shortly be seen, highways are generally created by dedication to the public use effected by the owner of the land over which they pass, and it is competent for the dedicator, not only to limit the extent of the right, but also to dedicate his land although it is in a state very unsatisfactory for public passage. For instance, an obstruction which, if created on an existing highway, would be a public nuisance, is not illegal when the way is newly dedicated to the public with that obstruction already in existence. The remedy of the public is not to accept the implied invitation of the owner to use the way (e).

Rights of Ownership in the Soil of Highways.—Since a highway is nothing other than the right of the public to pass and re-pass over land, it follows, subject to any statutory enactment or rule to the contrary, that the ownership of the soil may remain in private hands. As Lord Mansfield said, quoting a still earlier authority (f),

"The King has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil."

(c) *Bateman v. Bluck* (1852) 18 Q.B. 870; 26 Digest 263, 41. *A fortiori* it may terminate at the sea: *Williams-Ellis v. Cobb* [1935] 1 K.B. 310; Digest Supp.

(d) *R. v. Saintiff* (1704) 6 Mod. Rep. 255; 26 Digest 262, 26.

(e) *Fisher v. Prowse* (1862) 2 B. & S. 770; 26 Digest 265, 66.

(f) *Goodtitle v. Alker* (1757) 1 Burr. 133, p. 143; 26 Digest 325, 586; see Anon (1468), Y.B. 8 Edw. 4, fo. 9, pl. 7.

Consequently, in the absence of evidence of other ownership, there is a presumption that the owners of the adjoining lands on either side also own the soil of the highway to its centre (*g*), and similarly that roadside wastes belong to the adjoining owner (*h*).

This continued private ownership of the soil over which a highway passes is not necessarily an entirely barren right. Any person using the highway for a purpose other than that for which it was dedicated commits a trespass and may be sued for damages by the owner of the soil (*i*). Any breaking up of a highway by an authority maintaining a public utility, such as tramways, water or gas, requires the sanction of statute, for otherwise, not only will such an obstruction amount to a public nuisance, but it will also be a trespass against the owner of the soil (*j*). In fact, the private ownership of the site over which a highway passes entitles the person in whom it is vested to exercise all such rights over the land as are not incompatible with the public right of passage or forbidden by statute (*k*). Thus he may be entitled to tunnel under the road, or to erect a bridge or telephone wires over it, so long as the public right of passage is not interfered with. Statute has in certain cases limited these rights. For instance, § 26 of the Public Health Act, 1875 (which applies in urban areas), makes it an offence for any person to cause any vault, arch, or cellar to be newly built or constructed under the carriageway of any street without the written consent of the local authority. Similarly, the provisions of §§ 25 to 28 of the Public Health Act, 1925 (which may be adopted by urban or rural authorities), limit

(*g*) *Cooke v. Green* (1823) 11 Price 736; 26 Digest 320, 523.

(*h*) *Grose v. West* (1816) 7 Taunt. 39; 26 Digest 323, 560.

(*i*) *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142; 26 Digest 317, 491 (interfering with shooting); *Hickman v. Maisey* [1900] 1 Q.B. 752; 26 Digest 317, 492 (watching race-horse trials). See, however, p. 573, as to the effect of the highway "vesting" in the highway authority.

(*j*) *Marriott v. East Grinstead Gas and Water Co.* [1909] 1 Ch. 70; 26 Digest 327, 599.

(*k*) *St. Mary, Newington, Vestry v. Jacobs* (1871) L.R. 7 Q.B. 47; 26 Digest 325, 587.

the right to place overhead rails, beams, pipes, cables, wires, wireless apparatus, or bridges over streets (*l*).

“Vesting” of Highways.—In spite of restriction by statute the law is still tender in dealing with the rights of the adjoining owner in whom it holds the freehold of a highway to be vested. One illustration of this tendency is afforded by the interpretation put by the courts on certain statutory provisions declaring that streets and roads and their materials shall “vest” in the local highway authority (*m*). It has been held by the House of Lords that

“the vesting of the street vests in the urban authority such property and such property only as is necessary for the control, protection and maintenance of the street as a highway for public use” (*n*).

The authority becomes actual owner of the street itself and of so much of the air above and of the soil below as is necessary for the ordinary user of the street as a street (*o*). The subsoil remains vested in its former owner and the authority acquires by the vesting no right, for instance, to prevent wires being carried over the street at a height greater than that required by traffic (*p*).

Right of Access to Highway.—Closely related to the private right of ownership in the soil of a highway is the private right of the owners of property adjoining a highway to obtain access

(*l*) As to what are “streets,” see below, p. 597.

(*m*) See Public Health Act, 1875, § 149 (vesting streets repairable by the inhabitants at large within urban areas in the urban authority); Local Government Act, 1888, § 11, and Local Government Act, 1929, § 29 (vesting county roads in the county council).

(*n*) *Per* Lord Herschell in *Tunbridge Wells Corporation v. Baird* [1896] A.C. 434, p. 422; 26 Digest 330, 618.

(*o*) But trees growing in a street vest in the local authority under the Public Health Act, 1875, § 149: *Stilwell v. New Windsor Corporation* [1932] 2 Ch. 155; Digest Supp.

(*p*) *Finchley Electric Light Co. v. Finchley Urban Council* [1903] 1 Ch. 437; 26 Digest 329, 608.

thereto from their own land (*q*). This private right entitles the adjoining owner to choose the spot at which his access shall be obtained, and interference with this right, whether by the highway authority or by a private individual, gives rise to a cause of action. But statute has limited the exercise of this private right of access. The same section of the Public Health Act, 1875 (*r*), which "vests" streets in urban authorities empowers those authorities to "cause the soil of any such street to be raised, lowered, or altered as they may think fit," and any exercise of this power overrides the private right of access belonging to adjoining owners, to the extent of preventing them from maintaining an action for interference with its exercise, though they may obtain compensation under the provisions of § 308 of the Act (*s*). Secondly, in areas in which § 18 of the Public Health Acts Amendment Act, 1907, has been adopted and is in force, any new crossing over a curbed or paved footway, forming part of a street which is a highway repairable by the inhabitants at large, requires the consent of the local authority; but this requirement of consent refers only to the sufficiency of the crossing as such, and does not deprive the adjoining owner of his right to access at any point (*t*).

A more serious limitation on the right of access is imposed by the Restriction of Ribbon Development Act, 1935. In the case of three types of highway this Act takes away the absolute common law right of access, and even limits the use of adjoining land (*u*). In the case of any road in respect of which a "standard width" has been adopted, or which is a classified road (*v*), or to which the provisions of the Act have been extended by the highway authority with the approval of the Minister of Transport, it is not lawful to make a new access without the

(*q*) See *W. H. Chaplin & Co., Ltd. v. Westminster Corporation* [1901] 2 Ch. 329; 26 Digest 333, 649.

(*r*) § 149.

(*s*) *Sellors v. Matlock Bath Local Board* (1885) 14 Q.B.D. 928; 26 Digest 332, 638.

(*t*) *Marshall v. Blackpool Corporation* [1935] A.C. 16; Digest Supp.

(*u*) See below, p. 604, as to the general provisions of the Act.

(*v*) That is classified under the Ministry of Transport Act, 1919, § 17.

consent of the highway authority (*w*). There is an exemption in favour of access needed for agricultural purposes, and consent must not be unreasonably withheld nor fettered with unreasonable conditions, and an applicant aggrieved by refusal of consent, or by conditions imposed on the giving of consent, may appeal to the Minister (*x*).

Creation of Highways—(i) Dedication.—Highways may come into existence as public rights of way either as the result of dedication or of statute. By the common law dedication of a way to the public use involves three elements. First, the owner of the soil must dedicate the way as a public highway, and it is a necessary condition of such dedication that he should have the *animus dedicandi*. Secondly, the dedication must be made by a person capable of effecting the dedication: in other words, the owner in fee must have been in possession at the material date or must have assented to the act of dedication, so that where land is in strict settlement at the time no dedication can be inferred. Thirdly, there must be acceptance by the public. Though these three elements are to be carefully distinguished, the whole question is one of fact and not law, and definite rules cannot be laid down, other than that the evidence must be considered as a whole. Dedication may be express, as by the execution of some formal document, or, more usually, is to be inferred from conduct. Similarly, acceptance does not require any formal act: mere user by the public is sufficient.

Public User.—Where a dispute as to the existence of a highway occurs, it is usual to rely upon user by the public as evidence both of dedication and of acceptance. As Brett J. said, in *Cubitt v. Lady Caroline Maxse* (*y*),

(*w*) Restriction of Ribbon Development Act, 1935, §§ 1 and 2. The restrictions are designed to safeguard traffic.

(*x*) *Ibid.*, § 7. A carefully defined right to compensation is also given: *Ibid.*, § 9.

(*y*) (1873) L.R. 8 C.P. 704, p. 715; 26 Digest 282, 181.

“Acceptance by the public is ordinarily proved by user by the public; and user by the public is also evidence of dedication by the owner. Both dedication by the owner and user by the public must concur to create a road otherwise than by statute.”

But user to have this effect must be both open, unobstructed and as of right, in order that acquiescence, and so dedication, may be inferred from it (a). Consequently, public-spirited landowners, who wish to permit the public to use a way without surrendering their rights in it, frequently adopt the expedient of maintaining a gate which is closed on one day in each year.

The length of the user, from which dedication may at common law be presumed, inevitably must vary with the facts of the case, a shorter period being sufficient where the owner has done some positive act indicating an intention to dedicate than where he has remained entirely passive.

Even if user sufficient to imply dedication and acceptance is proved, it does no more than create a presumption that the way is a highway, and this inference may at common law be rebutted by evidence of the title to the land, showing that there has been no person at the material date competent to dedicate (b). As the persons interested in proving dedication and acceptance frequently have no knowledge of the state of the title to the land in question, but have only the fact of public user upon which to base their case, this rule often led to unsatisfactory results, and the rights of the public were made to depend upon the accidents of conveyancing.

(ii) Rights of Way Act, 1932.—To remedy this defect and to give more certainty to the process of acquiring public rights of way by user, the Rights of Way Act, 1932, was passed. In considering the provisions of this Act it is important to appreciate the basis upon which highways may

(a) *Folkestone Corporation v. Brockman* [1914] A.C. 338, p. 352; 26 Digest 284, 189.

(b) *R. v. Petrie* (1855) 4 E. & B. 737; 26 Digest 284, 187. But this was not necessarily conclusive. In a proper case public user during living memory, even though during the whole of that period there was no capable dedicatory, was evidence from which dedication at some earlier time might be inferred: *Williams-Ellis v. Cobb* [1935] 1 K.B. 310; Digest Supp.

be created at common law. That basis is dedication and acceptance, and long user by the public does not, as does long user of a private easement, give rise to a title by prescription. In the case of an alleged highway, at common law user is merely evidence from which dedication and acceptance may be inferred as a matter of fact, but the Act for the first time gives direct effect to proof of user.

The Rights of Way Act, 1932, is drawn on the pattern of the Prescription Act, 1832, and its provisions must be briefly summarised. The Act only applies to ways "not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication"; nor can any rights be acquired under it against a corporation or other body possessed of land for statutory purposes incompatible with dedication of the way. Under the Act the ways, to which its provisions apply, may be acquired by public user for certain periods of time, but in every case the user by the public must be "as of right and without interruption." "As of right" in this connection means that the members of the public using it believe themselves to be exercising a public right, with the consequent corollary that the enjoyment must be *nec vi, nec clam, nec precario*. Similarly the "interruption" referred to means some interference with the enjoyment of the way, such as a physical obstruction, and not a mere discontinuance of user (c). If a way thus used has been actually enjoyed by the public for the full period of twenty years before the public right to use it has been brought in question, then the way "shall be deemed to have been dedicated as a highway," unless it can be proved that there was no intention during the period to dedicate, or that there was not at any time during the period any person in possession of the land capable of dedicating the way. This provision, it will be seen, merely fixes a term of twenty years' public user as sufficient to raise the presumption of dedication, and leaves it still able to be

(c) *Merstham Manor, Ltd., v. Coulsdon and Purley Urban District Council* [1937] 2 K.B. 77; [1936] 2 All E.R. 422; Digest Supp.; *Jones v. Bates* [1938] 2 All E.R. 237; 158 L.T. 507; Digest Supp.

rebutted by showing the absence of the *animus dedicandi* or the incapacity of the possessor. Secondly, however, the Act provides that, if a way is enjoyed by the public for a full period of forty years before the right is brought in question, the way "shall be deemed conclusively to have been dedicated as a highway," unless it is shown that during that period there was no intention to dedicate. In other words, if forty years' user by the public is shown, the absence during that period of a competent dedicator is no bar.

The Act further provides that the taking of certain steps by landowners shall be "sufficient evidence to negative the intention of the owner of the land to dedicate." Thus notices visible to those using the way, or the deposit of maps and statutory declarations with local authorities may be resorted to. These are not, however, defined in such a manner as to amount to the only evidence available to show the absence of the *animus dedicandi*. Moreover, the Act gives to reversioners and remaindermen certain powers enabling them to prevent the period of forty years' public user from running to their detriment. A landlord may place and maintain notices, and a remainderman may sue, as if he were in possession, in order to prevent the acquisition of a public right of way.

The Act does not, however, abolish the common law rules as to dedication and acceptance; but the periods of twenty and forty years it mentions are to be construed as minimum periods, so that the common law doctrine of dedication inferred from user is totally superseded by the statutory provisions where that user has continued for twenty years before the right was brought in question. On the other hand, it is still possible to base a claim on express dedication and acceptance, and the Act does not even prevent dedication from being presumed in a proper case from public user for a period less than either of those mentioned in the Act (*d*).

(iii) Creation by Statute.—Highways may be created by statute in a variety of ways. Local Acts sometimes directly

provide for the creation of defined highways, and the awards of commissioners, empowered under Inclosure Acts to set out highways, have a similar origin. Again, the Minister of Transport is empowered by statute to construct new roads or to make advances to highway authorities for the purpose of enabling them to construct new roads, and in either case the roads when made become highways (*e*).

“Once a Highway always a Highway.”—We have seen how highways may come into existence ; it remains to inquire how long they may continue to retain their character as public rights of passage. The law on this subject was succinctly stated by Byles J. in *Dawes v. Hawkins* (*f*) :

“It is an established maxim—once a highway always a highway : for, the public cannot release their rights, and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of *ad quod damnum*, or by proceedings before magistrates under the statute.”

Stopping up and Diversion of Highways.—The statute referred to is the Highway Act, 1835, and to the list of methods of stopping or diverting highways here mentioned may be added the provisions of local Acts and of certain statutes, such as the Housing Act, 1936 (*g*), the Town and Country Planning Act, 1932 (*h*), and Inclosure Acts, which permit such a course to be adopted for special purposes.

(i) **The Writ of *ad quod damnum*.**—The original practice for the stopping or diversion of highways was for the interested party to obtain the issue from the Chancery of the writ of *ad quod damnum* directing the sheriff to empanel a jury to inquire whether the closing or diversion would interfere injuriously with the public. If the jury found that injury would

(*e*) Development and Road Improvement Funds Act, 1909, §§ 9 and 10 ; Roads Act, 1920, § 4 and 2nd Schd. The provisions of the Public Health Act, 1875, §§ 150 to 152, and the Private Street Works Act, 1892, afford another illustration of a statutory creation of highways in the cases to which they apply : see below, pp. 598–601.

(*f*) (1860), 8 C.B.N.S. 848, p. 858 ; 26 Digest 295, 270.

(*g*) § 46.

(*h*) § 11 and 2nd Schd.

not result to the public, the Crown might grant a licence to stop up or divert the highway. After 1697 (*i*) an appeal to quarter sessions from the finding of the inquisition was given to any interested person. The procedure under the writ of *ad quod damnum* has long been obsolete, being replaced by simpler statutory procedure.

(ii) **Highway Acts.**—The present procedure for the stopping and diversion of highways is contained in the Highway Acts, 1835 (*j*) and 1862 (*k*), and is complicated in the extreme. It will be sufficient here to sketch the procedure in outline.

The only ground on which a highway may be stopped up under the Acts is that it is “unnecessary,” and the only grounds on which it may be diverted are that the proposed new road is “nearer” or “more commodious to the public.” The first step is for the individual desiring the stopping up or diversion to address a written notice to the highway authority, and nothing further can be done unless that authority passes a resolution in favour of the proposal. In addition to this resolution the consent of every parish council or parish meeting affected must be obtained in special form (*l*). Next, if a diversion is proposed, the written consents of the persons through whose land the proposed new road is to run must be received. When these preliminaries have been successfully completed, the highway authority must procure two justices of the peace to view the *locus in quo*, and if they are favourable, notices must be affixed and published in prescribed manner. When the time during which these notices must be published has elapsed, and on proof of this fact, the two justices may certify that the way is unnecessary or that the proposed new way would be nearer or more commodious. The certificate and a plan must then be lodged with the clerk of the peace, and

(*i*) Stat. 8 & 9 Wm. 3, c. 16.

(*j*) §§ 84 to 91.

(*k*) § 44. Amended by the Public Health Act, 1875, § 144; Local Government Act, 1888, § 11; Local Government Act, 1894, §§ 13, 19 and 25; Local Government Act, 1929, §§ 29, 30, 31, 32 and 34, and 1st Schd.

(*l*) Local Government Act, 1894, §§ 13 and 19 (8).

at the next quarter sessions a motion must be made to enrol the certificate and make the necessary order. Any person aggrieved may appear and contest the certificate, and, if he can convince the jury that the way is not unnecessary, or that the proposed new way will not be nearer or more commodious, or that he will be injured or aggrieved by the proposed action, the order cannot be made. If this does not happen and the procedure has been properly followed, the court may issue the necessary order. But, if a diversion is ordered, the old way cannot be closed until the new way has been made, viewed by two justices, and their certificate enrolled at quarter sessions (*m*).

Section 2.—HIGHWAY AUTHORITIES

Maintenance and Repair.—So far we have considered what are highways, how they come into existence, and how they may be extinguished; but the matter which justifies the discussion of the law relating to highways in this place has yet to be dealt with. Even in early times the maintenance and repair of highways was an important duty, and at the present day, when the surfaces of roads require so much expensive treatment to make them suitable for fast traffic, the performance of these duties by a highway authority is essential to their utility.

History.—It is said that the maintenance of highways was originally part of the *trinoda necessitas* cast by the law on every man (*n*)—a fact still borne out by the expression “repairable by the inhabitants at large”—and in mediaeval times this duty seems to have been enforced through the organisation of the manorial court. The liability to repair resting upon the inhabitants at large was, after the Statute for the Mending of Highways of 1555, enforced on a parochial basis, and this came to be regarded as a principle of common law. So much was this so that a statute imposing a liability to repair on a specified

(*m*) See *Stockwell v. Southgate Corporation* [1936] 2 All E.R. 1343; on appeal, [1937] 3 All E.R. 627; 155 L.T. 437; Digest Supp.

(*n*) Blackstone, *Commentaries*, Vol. I, p. 357.

body or person was not, in the absence of express provisions to that effect, regarded as relieving the parish of its responsibility (*o*). To this general rule there existed, and still exist, exceptions, where an owner of land is bound to repair a highway. This may occur in two cases. Liability *ratione tenurae* occurs where as an incident of the tenure of land a private individual is under a duty to repair a highway. Strictly such a liability, unless arising from a grant of the Crown, must have its origin in a grant before the Statute *Quia Emptores*, 1290 (*p*). If no grant can be shown it is uncertain whether the liability must be proved to be immemorial (*q*), but in practice proof of repair by the landowner and his predecessors in title for a considerable period is sufficient to establish the liability. Liability *ratione clausurae* occurs where, a highway having crossed unenclosed land, over which the public had acquired a right to deviate when the way was foundurous, the owner enclosed the adjoining land. As he thus deprived the public of their right to deviate, he became liable to repair the way (*r*). On the other hand, merely laying out and dedicating a road does not impose the duty of repair upon the landowner : the liability to repair must rest upon the tenure of the lands held.

Tudor Legislation.—The necessity of more efficient machinery for the repair and maintenance of highways became apparent in the sixteenth century, when the manorial organisation was breaking down and the need of better communications was becoming felt. The result was the passing of the Statute for the Mending of Highways in 1555, which cast upon the parish the duty of mending the highways passing through it. The Act required the constables and churchwardens annually

(*o*) *R. v. Inhabitants of Brightside Bierlow* (1849) 13 Q.B. 933 ; 26 Digest 304, 359.

(*p*) *Ferrand v. Bingley Urban Council* [1903] 2 K.B. 445, p. 451 ; 26 Digest 370, 955.

(*q*) *R. v. Sheffield Canal Co.* (1849) 13 Q.B. 913 ; 26 Digest 367, 929.

(*r*) *Duncomb's Case* (1634) Cro. Car. 366 ; 26 Digest 372, 972. Liability *ratione tenurae* or *ratione clausurae* has in many cases come to an end by transfer to the highway authority, either by order of the justices under the Highway Act, 1835, § 62, or the Highway Acts, 1862, § 35, and 1864, § 24, or by agreement under the Public Health Act, 1875, § 148.

to summon the inhabitants together and elect two surveyors of highways, who were to be charged with the maintenance and repair of the highways of the parish. The work of repair was to be performed by the occupiers of land in the parish, the surveyors being empowered to appoint four days upon each of which the persons liable were required to furnish the equipment and men which the Act demanded of them. This "statute labour" was to be unpaid and performed under the direction of the surveyors for eight hours on each of the appointed days. In 1562 (*s*) the Act of 1555, which had been enacted for only seven years, was extended for a further period, and the number of days of compulsory statute labour was raised from four to six annually. In 1587 (*t*) this legislation was made perpetual. To enforce the provisions of these enactments a series of penalties was prescribed, the fines levied being dedicated to the repair of the highways. In the Act of 1555 these penalties were to be recovered before the leet or at quarter sessions; in 1562 the surveyor was required to inform the next justice of defaults and the justice was to present them at quarter sessions.

Act of 1691.—This system was to some extent recast in 1691 (*u*), and greater control was given to the local justices, quarter sessions being formed into an appeal tribunal. Under the Act of 1691 the justices of the petty sessional division were required to hold special highway sessions at stated intervals at which they were to supervise the repair of highways in the parishes lying in the division. The appointment of parochial surveyors of highways was taken from the parish and given to the special sessions, the justices choosing the surveyors from a list prepared annually by the vestry. The surveyors' accounts were to be passed at special sessions and defaulters were to be dealt with there.

Highway Rates.—The whole scheme, as so far outlined, depended upon the personal labour of the parishioners, but the

(*s*) Stat. 5 Eliz., c. 13.

(*u*) Stat. 3 Wm. & M., c. 12.

(*t*) Stat. 29 Eliz., c. 5.

necessity of raising a highway rate and performing the work of maintenance by hired labour was already becoming apparent. In an indirect manner this had always been possible. First, if a highway was allowed to fall into disrepair, the parish responsible for it was liable to be indicted at quarter sessions for a public nuisance, and this procedure was facilitated by the Act of 1562, which in such cases permitted the presentment of one justice to be received at quarter sessions as equivalent to the presentment of the grand jury. If the parish was convicted a fine could be imposed, which could be levied on any inhabitant, and the money devoted to paying for the repairs. The Act of 1691 permitted the individual inhabitant, who had been compelled to discharge what was in reality the liability of the whole parish, to procure the special sessions to make a rate on the parish in order to reimburse him ; so that through the procedure by indictment the levying of a highway rate might ultimately be obtained. Secondly, the Acts contained a tariff of fines to be imposed upon persons who failed to perform their statute labour, and in effect defaulters could under these provisions commute their labour for a money payment.

In 1662 (*v*), however, the raising of a direct rate was first permitted. The Act which so provided only permitted a sixpenny rate and was designed merely to provide for extraordinary repairs which had then accumulated and which statute labour could not remedy. Consequently, it was only temporary, its provisions being in force for only three years, and in 1670 (*w*) another temporary Act re-enacted them for a further three years. The first permanent highway rate was introduced by the Act of 1691. Under its provisions the sixpenny rate for repairs, incapable of being remedied by statute labour, was authorised to be made by quarter sessions as need arose, and special sessions were empowered to make rates to cover the surveyors' expenditure upon materials for road repairs. In 1715 (*x*) it was made clear that the sixpenny rate

(*v*) Stat. 13 & 14 Car. 2, c. 6.

(*x*) Stat. 1 Geo. 1, st. 2, c. 52.

(*w*) Stat. 22 Car. 2, c. 12.

for supplementing statute labour might be levied before the statute labour was performed, and a sixpenny rate for repairing streets in towns was authorised. From this date, therefore, it became possible to raise, as a usual feature of parochial highway administration, a rate for the repair of roads, and as time passed the practice of doing so became prevalent.

The system of highway repair outlined above remained in force until the Highway Act of 1835 introduced a more modern system, though by Acts of 1766 (*y*) and 1773 (*z*) the earlier legislation was consolidated.

Ad hoc Authorities.—The parochial system, based on the unpaid statute labour of the occupiers of land in each parish, may have been adequate for maintaining the country roads of the seventeenth century, which had little call for withstanding the effects of wheeled traffic, but the eighteenth century found the system incapable of meeting the needs of the fast mail coach or of providing the streets required in the growing urban centres. To satisfy both these wants resort was had to *ad hoc* authorities created by local Acts.

(i) **Turnpike Trusts.**—The maintenance of roads required to provide through routes for coaches was more than the resources of the parish could meet, and the existing highway legislation provided no power to build new roads. These difficulties were met by the creation of turnpike trusts, starting from almost the beginning of the eighteenth century. Local Acts were procured each setting up a body of trustees with power to construct and maintain a defined piece of road and to take specified tolls from persons using it. The Act gave these powers for a limited period of years, usually twenty-one, for at first the creation of turnpike trusts was regarded as no more than a temporary expedient. But the trustees were also given powers of borrowing on the security of their tolls, and this fact, coupled with the experience gained of the maintenance necessary for main roads, led invariably to the renewal

(*y*) Stat. 7 Geo. 3, c. 42.

(*z*) Stat. 13 Geo. 3, c. 78.

of the trust's power for further terms; so that in effect a trust once created might expect an almost permanent existence. The turnpike trusts did furnish the country with a network of main roads, but the incompetence of their finance and the fact that their members were chosen by co-optation rendered them open to the most serious criticism.

(ii) Paving Commissioners.—In towns the necessity for paved streets led to the creation by local Acts of paving commissioners, though such Acts did not become common until half-way through the eighteenth century. The commissioners were generally empowered to pave and maintain streets, and to borrow money and levy rates for these purposes. Both paving commissioners and turnpike trusts employed hired labour and, at any rate at the beginning of the nineteenth century, had begun to employ professional surveyors and engineers.

Position at the Beginning of the Nineteenth Century.—The law as to the authorities charged with the repair of highways fell, then, at the beginning of the nineteenth century into three parts. Many pieces of main road were maintained by turnpike trustees, many streets in urban areas were controlled by paving commissioners, while all the remaining highways were repaired by the parochial surveyor with the aid of statute labour and a rate. The reforms of the nineteenth century dealt differently with each of these classes of highways, and it is convenient in the first place to consider the legislation relating to the residuary class of parochially maintained highways.

Reforms of the Nineteenth Century—(i) Parochial Highways.—In respect of these roads the Highway Act, 1835, repealed the older legislation, finally abolished the old system of statute labour, and, while still retaining the parish as the normal unit of administration, much reduced the control formerly exercised by the justices. The Act permitted the parochial maintenance of highways to be carried on in any of three forms. First, the inhabitants of the parish in vestry

assembled were required to appoint one or more persons to be surveyors of highways for the ensuing year (*a*), but, if the inhabitants failed to discharge this duty, the appointment was to be made by the justices (*b*). The office was compulsory and normally unpaid : but if the vestry preferred it might elect a person of skill and experience to serve the office at a fixed salary (*c*). The surveyor was charged with the duty of maintaining and repairing the highways in the parish, and, for the purpose of recouping the expenses he had incurred in the discharge of his duties, he was authorised to levy a rate (*d*). Secondly, in a parish with a population of over five thousand a highway board might be elected which was to exercise all the powers and responsibilities of the vestry and the surveyor (*e*). As the board was the surveyor, it was empowered to carry on the actual work of maintaining and repairing its highways through the agency of a paid assistant surveyor. Thirdly, a number of parishes might apply to the justices in quarter sessions to be formed into a highway district, and, if the justices granted the application, they were also to appoint a salaried surveyor for the united district (*f*). The district surveyor was to have the same powers in the district as the surveyor of highways had in the parish, except the power to levy a rate. The duty of financing the district surveyor's work was laid upon the parish surveyors, who were required to raise the necessary moneys in their parishes by rate (*g*).

(ii) **Urban Streets.**—In many urban areas, however, as we have already seen, the duty of maintaining streets had been cast on paving or improvement commissioners, and in the public health legislation, which commenced in the middle of the nineteenth century, this idea was extended. Following the precedent tentatively set by the highway boards under the Highway Act, 1835, the powers and duties of surveyors of highways became vested in the borough councils, local boards of health and improvement commissioners who formed the

(*a*) § 6.
(*e*) § 18.

(*b*) § 11. (*c*) §§ 8 and 9.
(*f*) §§ 13 and 14.

(*d*) § 27.
(*g*) § 17.

sanitary authorities in urban areas (*h*). The effect of this legislation was to confine the organisation provided by the Highway Act, 1835, to those areas which had not adopted the provisions of the Public Health Acts and become "urban."

Highway Act, 1862.—The need for larger units of administration for highway purposes in these residuary rural areas led to the passing of the Highway Act, 1862. Under that Act quarter sessions was empowered to create highway districts, each governed by a highway board consisting of waywardens, elected by the constituent parishes, and of the justices resident in the district. These new highway boards when constituted became surveyors of highways for the parishes situated in their districts (*i*).

Public Health Act, 1875.—The next step in the complicated story of the evolution of highway authorities was taken by the Public Health Act of 1875. This Act re-named the bodies already maintaining streets in urban areas as "urban sanitary authorities," and once more provided that in every urban district the borough council or urban sanitary authority should be the surveyor of highways and should exercise all the powers of the surveyor and vestry (*j*).

Local Government Act, 1894.—The Local Government Act, 1894 (*k*), again re-named the urban sanitary authorities, other than borough councils, and gave them their present name of "urban district councils." In rural districts it also abolished the highway boards and made the rural district councils the highway authorities and surveyors of highways (*l*). By the end of the nineteenth century, therefore, the position as regards the maintenance and repair of ordinary highways

(*h*) Public Health Act, 1848, § 117; Local Government Act, 1858, §§ 4 and 6.

(*i*) §§ 17 and 18. It was in consequence of the rush by rural parishes to evade compulsory merger into a highway district under this Act, by adopting the Local Government Act of 1858, that the Local Government Amendment Act, 1863, was passed, which prevented the acquisition of an "urban" status by a parish with a population under three thousand. See p. 488.

(*j*) §§ 6 and 144.

(*k*) § 21.

(*l*) Local Government Act, 1894, § 25.

had been much simplified. The duties and powers of surveyors of highways and vestries under the Highway Act, 1835, were uniformly vested in the general local authorities, and *ad hoc* bodies had disappeared. In urban areas the borough councils or urban district councils, and in rural districts the rural district councils were the highway authorities and the surveyors of highways.

(iii) **Turnpikes.**—But we have still to consider the later history of those roads which at the beginning of the nineteenth century were administered by turnpike trustees. The development of the railway brought financial ruin to many turnpike trusts through the decline in tolls it caused, and various expedients for diverting part of the highway rate to the aid of the trusts were tried. By 1871 opinion had turned against the continuance of tolled roads, and in that year Parliament established a committee to examine bills for the renewal of turnpike trusts and to recommend which should be granted. The committee leaned heavily in favour of refusing renewal, with the result that in 1895 the last trust was wound up. At first when a road thus became “dis-turnpiked” it fell back into the position of an ordinary highway repairable by the inhabitants at large, and its future maintenance was cast upon the local highway authorities through whose districts it passed. This was regarded as an unfair burden. The existing system for the administration of ordinary highways was purely local, and was based upon the assumption that the roads maintained would serve only local convenience; the main channels of communication had been kept out of this scheme because their utility was national rather than local. Dis-turnpiked roads, it was urged, if they were no longer to be paid for by their users, should be maintained at the cost of wider areas than those governed by the local highway authorities.

“**Main Roads.**”—The result was a compromise introduced by the Highways and Locomotives (Amendment) Act, 1878. That Act provided that all roads dis-turnpiked after 1871 should become “main roads,” in respect of which the local

highway authorities who maintained them should be entitled to claim reimbursement of one-half of the cost from quarter sessions. Thus one-half of the expenses of the highway authorities in maintaining main roads was cast on the county (*m*). Power was given to the county authority to declare other roads to be main roads, and for the Local Government Board (now the Minister of Transport (*n*)) by provisional order to "dismain" a main road.

This system, by which the county paid half the cost of maintaining main roads, did not prove entirely satisfactory, and the Local Government Act, 1888 (*o*), cast the whole burden of maintaining main roads on the new county councils. But it conferred upon borough councils and urban authorities the right to claim to retain the maintenance of main roads in their own hands, the county council paying each authority which did so such an annual sum as, in the absence of agreement, might be determined by the Local Government Board. Moreover, the county council was empowered to contract with any district council, urban or rural, for the maintenance by the latter of the county's main roads passing through its district. Lastly, the county council was authorised to contribute towards the cost of maintenance of any highway although it was not a main road. County borough councils were put in the same position as regards main roads in their areas as were county councils in respect of main roads in their counties, but the former authorities were already highway authorities for secondary or ordinary roads, while the latter were not (*p*).

Position at the End of the Nineteenth Century.—The position from 1894 until 1930 was, therefore, that outside county boroughs, main roads were maintained at the expense of the county council. But the actual work of repair might be done

(*m*) In 1882 a grant-in-aid amounting to one-quarter of the cost of maintaining main roads was first given to highway authorities, and in 1887 a second quarter was granted, but this time to the counties.

(*n*) Ministry of Transport Act, 1919, § 2.

(*o*) § 11.

(*p*) Local Government Act, 1888, § 34.

by the county council itself, or by a borough council or urban district council which had claimed to retain its main roads, or by a borough or urban or rural district council acting under contract with the county council. Ordinary highways were maintained by borough councils and by the councils of urban and rural districts. In county boroughs all highways were maintained by the county borough council.

Local Government Act, 1929.—The increase in the use of the roads resulting from the development of motor transport caused attention to be focused upon the question of highway administration, for the motor car deprived many roads of their former local character and greatly increased the cost of maintenance. This was reflected in the provisions of the Local Government Act, 1929. The general policy of this Act was to transfer services from the lesser authorities to the councils of counties and county boroughs. So far as highways are concerned, county borough councils were already the authorities for all the highways within their boundaries, so that to further the policy of the Act changes only needed to be made in the county areas.

“County Roads.”—The Act introduced a new nomenclature. Roads which under its provisions were to be maintained by county councils were known as “county roads” (*r*). These included all the older main roads, all highways situated in rural districts, and all classified roads (*s*) in non-county boroughs and urban districts (*t*). The result of this legislation was that rural district councils ceased to be highway authorities, and the councils of non-county boroughs and urban districts lost jurisdiction over all their highways except unclassified roads. But in non-county boroughs and urban districts with a population exceeding twenty thousand the councils may claim

(*r*) § 29.

(*s*) That is, classified by the Minister of Transport under the Ministry of Transport Act, 1919, § 17, and in respect of which grants may still be paid in counties: Local Government Act, 1929, 2nd Schd.; see above, p. 180. They include all roads and streets of any importance to traffic.

(*t*) §§ 30 and 31.

to retain the maintenance and repair of their county roads, receiving from the county council annually the sums expended on the work (*u*). Moreover, county councils may delegate any of their highway functions to the councils of non-county boroughs and urban and rural districts, and, if one of the last councils applies for the right to maintain the unclassified roads within its district, an appeal to the Minister of Transport lies from the county council's refusal (*v*). Where road functions are thus delegated the works to be executed and the expenditure to be incurred by the district council must be approved by the county council (*w*). Conversely, agreements may be made between a non-county borough council or an urban district council and the county council under which, in consideration of payment by the former, the county council undertakes to maintain the unclassified roads in the borough or district (*x*). The object of these complicated provisions is to give the maximum elasticity in the organisation of road maintenance, so that the needs of particular areas may be most efficiently met. The corresponding system of grants in aid of road construction and maintenance as well as the powers of the Central Departments to withhold grants have already been mentioned (*y*), and serve as a reminder that roads are matters of national and not merely county interest.

Trunk Roads.—But the needs of a co-ordinated system of road communication based on wide areas of administration did not obtain complete satisfaction by the Local Government Act of 1929. The logical step of transferring to the direct control of the Central Government the principal roads, constituting the national system of routes for through traffic, was taken by the Trunk Roads Act, 1936. This Act defined twenty-six such roads in England and Wales as "trunk roads" and provided that the Minister of Transport should become

(*u*) §§ 32 and 33. Estimates must be submitted to the county council for approval, but such approval must not be unreasonably withheld. Any question whether approval has been unreasonably withheld is to be determined by the Minister of Transport.

(*v*) § 35.

(*w*) § 36.

(*x*) § 34.

(*y*) See above, pp. 180 and 357.

the highway authority for them. This transfer of functions does not apply, however, in respect of any part of a road situate in the county of London or in any county borough, and the Act provides for the division of duties in respect of trunk roads between the Minister and the former highway authorities, while the Minister may delegate his functions to county, borough or urban district councils. The extension of the length of trunk roads is now under consideration.

Highway Powers of Rural Districts and Parishes.—To this review of highway authorities there should be added for the sake of completeness the minor functions still retained by the rural district councils and parish councils and meetings. Rural district councils have the duty to protect all public rights of way and to prevent their stoppage or obstruction where the interests of the district would be prejudiced, as well as to prevent unlawful encroachment on roadside wastes (*z*). Parish councils may acquire by agreement rights of way beneficial to their inhabitants (*a*), and parish councils or parish meetings may petition the county council to act where the rural district council has defaulted in its duty of protecting public rights of way and roadside wastes (*b*). Again, the consent of the parish council or parish meeting is necessary before proceedings can be initiated for the stopping up or diversion of a highway, and a parish council may undertake the maintenance and repair of public footpaths other than those at the side of public roads (*c*).

Highway Authorities.—We may sum up the confused story of the emergence of the present highway authorities, by stating in tabulated form the present position. There are four types of highway authorities :—

(1) The Minister of War Transport in respect of trunk roads not lying within London or county boroughs ;

(*z*) Local Government Act, 1894, § 26 ; Local Government Act, 1929,
§ 30.

(*a*) Local Government Act, 1894, § 8.

(*b*) *Ibid.*, §§ 19 and 26.

(*c*) *Ibid.*, §§ 13 and 19.

(2) County borough councils in respect of all roads in their respective boroughs ;

(3) County councils in respect of county roads, being classified roads in urban districts and all roads in rural districts, but not including any trunk roads. But non-county borough councils and urban district councils may have claimed to retain their county roads, while the county council may delegate its highway functions to district councils ;

(4) The councils of non-county boroughs and urban districts in respect of unclassified roads in their boroughs or districts.

Highways “repairable by the inhabitants at large.”—

We have now traced the history of the authorities charged with the duty of highway maintenance and repair, but it remains to notice that these authorities are only directly responsible for those highways which are “repairable by the inhabitants at large.” But it seems that the institution of modern highway authorities has not relieved the parish of its ancient liabilities, as being that unit through which the duty of the inhabitants at large was enforced. Hence, it seems, that the remedy by indictment for failure to repair is still available, but that it will only lie against the inhabitants of the parish and not against the modern highway authority which has in practice superseded them in the work of maintenance and repair (*d*). However there is no liability, either on the parish or the highway authority, to maintain or repair highways unless they are repairable by the inhabitants at large. We have already seen that the existence of local authorities for highway maintenance does not relieve any person of liability

(*d*) *R. v. Poole Corporation* (1887) 19 Q.B.D. 602 ; 26 Digest 376, 1015. It may be added that no action will lie against a highway authority for the mere non-feasance of failing to repair, though an action will lie against it in respect of injury caused through its mis-feasance : see above, p. 446. But a highway authority may recover extraordinary expenses caused by traffic of excessive weight or extraordinary nature from the person responsible for such traffic : Road Traffic Act, 1930, § 54, re-enacting Highways and Locomotives (Amendment) Act, 1878, § 23 ; Locomotives Act, 1898, § 12.

to repair *ratione tenuræ* and *clausuræ* (e). But this is not the only exception. As we have already seen, a highway may come into existence by dedication and acceptance, and the dedicator comes under no liability to repair the way or even to put it originally into a proper state for public passage. The effect of dedication and acceptance is to make the way a public highway, and formerly it also automatically imposed the duty of repair upon the parish or other highway authority. When, towards the end of the eighteenth century, towns began to grow, this result was felt to be unfair. A builder laying out a building estate could dedicate what strips of land he found most convenient to enable his operations to proceed to advantage, and could leave their maintenance and even their original making to the highway authority. Consequently, local Acts, under which paving commissioners were set up, began the practice of requiring streets to be properly paved at the private expense of the individuals deriving benefit from them, before the liability to repair was imposed upon the commissioners. The precedents thus set have been followed and incorporated into the general law, and we must now consider the "adoption" of highways and streets by the highway authority, which forms the condition upon which they become repairable by the inhabitants at large.

Adoption under the Highway Act, 1835.—The first general piece of legislation of this kind at present in force is § 23 of the Highway Act, 1835. This section exempts the highway authority from all liability for the repair of any road made and dedicated by a private individual or corporation since the coming into operation of the Act, unless certain conditions precedent have been observed. Since the Act, therefore, when a person dedicates a road it becomes a public highway, but is not repairable by the highway authority until the provisions of the Act have been complied with. Dedic-

(e) This is still preserved by the Local Government Act, 1929, § 38. If the person liable fails to repair after due notice, the highway authority may do the necessary work and recover the cost: Local Government Act, 1894, § 25.

tion and acceptance alone make it a highway, but leave it with no one responsible for its repair (*f*).

The Act lays down the conditions which must be observed before a road dedicated after its coming into force becomes repairable by the inhabitants at large. The person proposing to dedicate a road, which he wishes to become repairable by the highway authority, must give to the authority three months' notice in writing and he must make up the road in a proper manner and to the prescribed width to its satisfaction. Two justices must view the road when completed and, if satisfied with it, must give a certificate. The certificate must be enrolled at quarter sessions and the road must be used by the public and repaired by the dedicator for twelve months, and thereafter it becomes repairable by the inhabitants at large. The highway authority is not, however, compelled passively to accept liability for a road which is of no public utility, for, on receiving the preliminary notice, it may apply to the justices, who, subject to an appeal to quarter sessions, may determine the question of utility (*g*).

Section 3.—STREETS

Streets.—If these provisions of the Highway Act of 1835 were not supplemented by other legislation, the effect, from the point of view of public health, might prove disastrous. The section leaves many highways with no person liable to see to their proper repair, and it is obvious that, especially in urban areas, it is most desirable that proper construction, sewerage and lighting should be provided (*h*). But the same argument is equally applicable to private roads even though they are

(*f*) *Roberts v. Hunt* (1850) 15 Q.B. 17; 26 Digest 362, 879; *R. v. Wilson* (1852) 18 Q.B. 348; 26 Digest 363, 880.

(*g*) Highway Act, 1835, § 23. Under a number of other statutes highways constructed since the Highway Act, 1835, may become repairable by the inhabitants at large, *e.g.*, Public Health Act, 1875, §§ 146 and 154; Development and Road Improvement Funds Act, 1909, §§ 9 and 10; Roads Act, 1920, § 4 and 2nd Schd.

(*h*) *Cababé v. Walton-on-Thames Urban Council* [1914] A.C. 102; 26 Digest 362, 876.

not public highways in the technical sense. Nor is this all: before streets are laid out it is desirable that the local authority should have the power to see that their position, width and construction are suitable. All these and other powers are conferred upon local authorities and comprise the law relating to "streets," some of the features of which must now be considered.

It is first necessary to determine the meaning of the word "street" when used in this essentially public health connection. In its popular sense the word "street" means a road with buildings on each side, but a definition of the word in relation to the statutory powers now to be considered makes it include

"any highway, and any public bridge (not being a county bridge), and any road lane footway square court alley or passage whether a thoroughfare or not" (*i*).

It has been held in the light of this definition that, where the context of the Acts requires, there is nothing to restrict the meaning of the word to its natural sense (*j*). Nor even need the expression be confined to a public highway, for it may include a private road over which the public have no right of passage, so long, at any rate, as there is nothing to prevent the public from passing over it (*k*). Indeed, in some cases the context may require the word to include not only the roadway but also the houses erected along it (*l*).

Private Street Works.—First may be considered the powers of local authorities to compel the proper making up of existing streets which are not already repairable by the inhabitants at large. These powers apply in two classes of "private streets." First, where the street is not even dedicated as a highway, and secondly where, though dedicated as a highway,

(*i*) Public Health Act, 1875, § 4.

(*j*) *Robinson v. Barton Eccles Local Board* (1883) 8 App. Cas. 798, p. 801; 26 Digest 269, 86; *Fenwick v. Croydon Rural Sanitary Authority* [1891] 2 Q.B. 216; 26 Digest 271, 103.

(*k*) *Midland Railway Co. v. Watton* (1886) 17 Q.B.D. 30; 26 Digest 267, 72; *Walthamstow Urban District Council v. Sandell* (1904) 68 J.P. 509; 26 Digest 271, 105.

(*l*) *Baker v. Portsmouth Corporation* (1878) 3 Ex. D. 157; 26 Digest 552, 2488.

it is not repairable by the inhabitants at large. In this respect two statutory codes exist, the powers being exercised in urban sanitary areas by the borough council or urban district council and in rural districts by the county council (*m*). The two codes are contained in §§ 150 to 152 of the Public Health Act, 1875, and the Private Street Works Act, 1892. The former code is applicable in all areas in which the second is not in force, without the necessity of any adoption or other formality; but the code contained in the Private Street Works Act, 1892, only comes into operation in urban areas on being specially adopted, and then it has the effect of making the code in the Public Health Act cease to apply (*n*).

(i) **Under the Public Health Act, 1875.**—Under § 150 of the Public Health Act, 1875, where the local authority to which it applies is not satisfied with the state of a street not repairable by the inhabitants at large and desires to proceed under the section, it must first prepare plans of the necessary work and an estimate of the cost. It may then serve notices on the owners or occupiers of the premises adjoining the street requiring them

“to sewer level pave metal flag channel or make good or to provide proper means of lighting the same within a time to be specified in such notice.”

During this time the plans and estimate must be open to the inspection of persons interested. If at the end of the time the frontagers have not complied with the notice (as is almost invariably the case), the local authority may do the work and apportion the cost among the owners in default “according to the frontage of their respective premises.” Any person aggrieved by any of the requirements of the local authority may appeal to the Minister of Health (*o*). When the work has been done to its satisfaction the local authority may, if it

(*m*) Local Government Act, 1929, § 30, and 1st Schd.

(*n*) The effect of the Local Government Act, 1929, § 30 and 1st Schd., is to enable the county council to proceed under the Private Street Works Act, 1892, without the necessity of any adoption.

(*o*) Public Health Act, 1875, § 268

thinks fit, put up a notice in the street declaring it to be a highway, and thereupon the street becomes a highway repairable by the inhabitants at large, unless within one month the owner or majority of the owners of the street object by notice in writing (*p*).

(ii) **Under the Private Street Works Act, 1892.**—The object of the Private Street Works Act, 1892, is the same, namely, the proper making up of streets not repairable by the inhabitants at large, but the procedure differs somewhat from that laid down in the Public Health Act. The Act of 1892 was designed to offer a remedy for what might be regarded as three defects in the earlier procedure. First, the frontagers were entitled themselves to comply with the notice and each to make up the strip of road in front of his own premises, a course which, if adopted by a few only out of several frontagers, might put the local authority to considerable trouble and expense. Secondly, the apportionment of the cost of the works undertaken by the local authority, simply by reference to the respective frontages of the owners of adjoining property, might be unfair, since it does not take into account the benefit or detriment which any property derives or suffers by reason of the carrying out of the street works. Thirdly, under the Public Health Act the only appeal of the frontager lies to the Ministry of Health, a bureaucratic and not a judicial authority.

The Private Street Works Act, 1892, meets these points by providing that a local authority to which it applies may resolve

“to sewer, level, pave, metal, flag, channel, or make good, or to provide means of lighting”

any street not being a highway repairable by the inhabitants at large which needs this work to be done to it. A specification of the works required, an estimate of the probable cost and a provisional apportionment of the cost among the premises liable must then be made, approved by the local authority,

(*p*) Public Health Act, 1875, § 152 ; Public Health Acts Amendment Act, 1890, § 41.

and published and served on the owners of the premises mentioned in the provisional apportionment. This apportionment may be made in accordance with either of two principles : the probable expense may be divided simply according to frontage, or, if the local authority so resolves, a different method may be employed (*q*). If the second course is taken, in making the apportionment regard must be had to the greater or less degree of benefit derived by any premises adjoining the street and to the amount and value of work already done by their owners or occupiers, while premises not adjoining the street may be included where access to them is obtained from the street and they will derive benefit from the works. When the works have been completed by the local authority a further final apportionment is made, the actual sum spent being divided in accordance with the proportions adopted in the provisional apportionment.

Any owner of premises affected is permitted to appeal before the works are commenced, or against the final apportionment when they are completed, and the appeal goes to the justices. When private street works have been completed the local authority may by fixing a notice in the street declare it to be a highway repairable by the inhabitants at large, and there is no power for the owners of the street to prevent this happening. Conversely, however, where the Act is in force, the greater part in value of the owners of the houses and land in a street which has been made good to the satisfaction of the local authority, may by application in writing compel the local authority to "adopt" the street and declare it to be a highway repairable by the inhabitants at large.

It was formerly held that a local authority in carrying out private street works had no power to vary the respective widths of the carriageway and footways (*r*) : but power to do

(*q*) The discretion whether so to resolve rests solely with the local authority, so that the justices on an appeal cannot quash the apportionment because the local authority has not resolved to adopt the wider principle : *Hornchurch Urban District Council v. Webber* [1938] 1 K.B. 698 ; [1938] All E.R. 309 ; Digest Supp. ; *Allen v. Hornchurch Urban District Council* [1938] 2 All E.R. 431 ; 54 T.L.R. 1063 ; Digest Supp.

(*r*) *Robertson v. Bristol Corporation* [1900] 2 Q.B. 198 ; 26 Digest 527, 2259.

so is now conferred by § 35 of the Public Health Act, 1925, subject to the proviso that no greater charge shall thereby be cast on the frontagers.

The powers under either § 150 of the Public Health Act, 1875, or the Private Street Works Act, 1892, are permissive, in the sense that the local authority is not compelled to act under them. But in areas in which § 19 of the Public Health Acts Amendment Act, 1907, is in force, the majority in number or rateable value of owners of lands and premises in a street may by notice in writing compel the local authority to exercise its powers under either of the codes, and, when the works are completed in such circumstances, the local authority must declare the street to be a highway repairable by the inhabitants at large.

Other Powers in relation to Streets.—Many powers are now given to local authorities to enable them to supervise the proper lay-out of proposed new streets, the orderly building of houses along their boundaries, and to improve existing streets, and some of these powers may now be instanced.

(i) **Improving Streets and making New Streets.**—Local authorities are not confined to making up existing streets. The Public Health Act, 1875 (s), gives a general power to urban authorities to purchase premises for the purpose of widening, opening, enlarging, or otherwise improving any street, or, with the sanction of the Minister of Health, for the purpose of making any new street.

(ii) **Lay-out of New Streets.**—It is obviously important that local authorities should be empowered to control the manner in which new streets are to be laid out in their areas, and extensive powers have been given to them for this purpose. The root of these powers is still to be found in § 157 of the Public Health Act, 1875, which empowers urban authorities to make bye-laws (*inter alia*) “with respect to the level width and construction of new streets, and the provision for the sewerage thereof.” These bye-laws may also provide for the

deposit of plans and sections and for inspection by the local authority. From this simple beginning a number of new powers have sprung. The Public Health Acts Amendment Act, 1907 (*t*), gives to the local authorities adopting it power to require the plans and sections of a new street to be altered so as to secure more convenient means of communication with any other street or an adequate opening at either of its ends. These powers were limited in their application to "new" streets, and the Public Health Act, 1925, has extended them by widening the definition of "new streets." Where this Act is in force a continuation of an existing street may be deemed to be a new street (*u*). Further, when the local authority considers that an existing highway will be converted into a new street as a consequence of building operations, the local authority may by order declare it to be a new street, but an appeal against the order lies to quarter sessions at the instance of any person aggrieved (*v*). Also, when a local authority is of opinion that a proposed new street will form a main thoroughfare, it may require the new street to be formed of such width as it may determine. If the width prescribed exceeds by more than twenty feet the maximum width required by the local bye-laws, the local authority must make compensation for any loss or damage sustained by reason of the street being required to be of such greater width, the amount of compensation, in default of agreement, to be determined by arbitration (*w*).

(iii) Buildings in Streets.—But powers of controlling the position, construction and width of the actual roadway of new streets are not enough either from the point of view of public health or of traffic. The buildings adjoining new or even existing streets and also roads must fall under the local authority's regulation. We are not at present concerned with the extensive powers of planning the whole development of an area which the Town and Country Planning Acts, 1932, 1943

(*t*) § 17.

(*u*) § 29.

(*v*) § 30.

(*w*) § 31.

and 1944 contain, but those Acts may be regarded as the apotheosis of the much narrower powers we are now considering.

The first of a series of powers for regulating the line of buildings fronting to streets is contained in § 155 of the Public Health Act, 1875. Under this section when a house or building situated in a street in an urban district has been taken down to be re-built or altered, the urban authority may prescribe the line to which the house or building shall be re-built, the owner of the house or building being entitled to compensation, to be settled in case of dispute by arbitration.

The Public Health (Buildings in Streets) Act, 1888 (x), prohibits the erection or bringing forward of any house or building in any street beyond the front main wall of the house or building on either side. This obviously desirable power can be used to prevent irregularity in the frontage line of buildings in streets.

Improvement Lines.—An extension of this principle was made by the Public Health Act, 1925, which gives powers to local authorities to prescribe “improvement lines” in streets. In the case of a street which will ultimately have to be widened, but the widening of which is not of immediate urgency, it is sometimes useful to the authority to have power to prevent new buildings from being erected in front of the line representing the ultimate intended width. This result may be obtained through the prescription of an improvement line. The procedure under § 33 of the Act of 1925 authorises a local authority to prepare a plan showing the suggested improvement line. This plan is deposited for the inspection of any person interested and notice thereof is given to occupiers and owners of the land affected. The local authority may, not less than six weeks after the date of the notice, by resolution prescribe the improvement line, having first considered any objections by persons interested. Thereafter no new building, erection or excavation may be placed nearer to the centre line

(x) § 3; re-enacting and extending the provisions of the Public Health Act, 1875, § 156.

of the street than the improvement line, except with the consent of the local authority. Any person whose property is injuriously affected by the prescribing of an improvement line is entitled to obtain compensation from the local authority in respect of such injurious affection, and the amount, in default of agreement, is to be determined by arbitration.

Building Lines in Roads.—This principle is obviously not confined in its utility to streets in urban areas, and § 5 of the Roads Improvement Act, 1925, authorises the county council or other highway authority to prescribe a “building line” in relation to either side of any part of a highway maintainable by it. The Minister of Transport may by order direct that a building line shall not be prescribed under this section in relation to any class of road classified by him under § 17 of the Ministry of Transport Act, 1919, until notification of the building line proposed has been sent to him and his observations with respect thereto have been considered. The subsequent procedure is similar to that in § 33 of the Public Health Act, 1925.

Restriction of Ribbon Development.—In the case of what may be loosely called main roads, the need of powers similar to those already possessed in respect of urban streets has led to the drastic provisions of the Restriction of Ribbon Development Act, 1935. As its name implies, this Act had for its object the prevention of building in long unsightly lines along the margins of roads stretching through open country, or on the outskirts of towns. The dictates of amenity in this matter are recognised by its provisions requiring co-ordination between the authority responsible for its working and planning authorities (y) ; but primarily the problem has been approached as one affecting traffic. The restrictions imposed by the Act are administered by the highway authority, except in the case of trunk roads where they are exercisable by the county council or other authority which immediately before the

(y) Restriction of Ribbon Development Act, 1935, §§ 7 and 8.

Trunk Roads Act, 1936, was highway authority for the road (*z*). The Act of 1935 imposes restrictions in two cases. First, it empowers the authority to adopt, with the approval of the Minister, a "standard width" for any road or proposed road. This standard width is determined by the probable requirements of the road for widening or construction to meet its traffic needs. The adoption of such a standard width is accordingly designed to sterilise the strip of land over which the road will ultimately spread. Hence the Act forbids the making of any new access to the road and all building, excavation or execution of works within the standard width without the consent of the authority (*a*). Secondly, the Act deals more broadly with all trunk roads (*b*), all classified roads, and all other roads to which its provisions are extended by the highway authority with the approval of the Minister. Thus a road which satisfies both sets of conditions, as for instance, being the object of a standard width and also a classified road, is subject to both restrictions. In the case of roads falling within this second class it is not lawful to make any access thereto or to build within two hundred and twenty feet of the middle of the road without the consent of the authority (*c*). In either case consent must not be unreasonably withheld nor must unreasonable conditions be imposed, and an appeal lies to the Minister of Transport (*d*). Compensation is payable in so far as proposals for development, which at the date of the claim are immediately practicable (*e*) or would be so but for the Act, are injuriously affected, but the claimant must also show that there is a demand for such development (*f*).

The Restriction of Ribbon Development Act, 1935 (*g*),

(*z*) Trunk Roads Act, 1936, § 4. The authority must, however, consult with, and act under the directions of the Minister in exercising its powers in respect of trunk roads.

(*a*) Restriction of Ribbon Development Act, 1935, § 1.

(*b*) Trunk Roads Act, 1936, § 4.

(*c*) Restriction of Ribbon Development Act, 1935, § 2. (*d*) *Ibid.*, § 7.

(*e*) See *Melksham Urban District Council v. Wiltshire County Council* [1937] 4 All E.R. 142; Digest Supp.

(*f*) Restriction of Ribbon Development Act, 1935, § 9. Grants may be made by the Minister in respect of standard widths: *ibid.*, § 19.

(*g*) §§ 13 and 14.

further confers wide powers of compulsory purchase on highway authorities. They may acquire land within two hundred and twenty yards of the middle of any road repairable by the inhabitants at large or of any proposed road where it may be necessary for the construction or improvement of the road or for preventing the erecting of buildings detrimental to the view from the road. In the case of trunk roads this latter power is exercisable only by the Minister (*h*).

The Act of 1935 has been amended temporarily by the Restriction of Ribbon Development (Temporary Development) Act, 1943, which enables, during the period of the war, development expedient in the public interest to be carried out and maintained notwithstanding that consent to permanent development has been refused. The Act allows a temporary consent to development, though not in that form. In the first place, temporary consents which highway authorities purported to give before the Act was passed are to be regarded as having been given under the present Act (*i*). Consequently a right of demolition will arise at the end of the period of emergency. In future cases formal refusal may be given accompanied by a notice postponing action under § 11 of the Act of 1935 until after the end of the "war period," *i.e.* a date to be fixed by Order in Council. After that date the Minister of Transport may direct authorities to exercise their powers under § 11, and to enforce such directions by *mandamus*.

(iv) **Public Health Powers.**—A few other powers of local authorities may be mentioned briefly. The requirements of convenience dictate the power to light streets conferred on urban authorities by § 161 of the Public Health Act, 1875. In rural areas powers of lighting could until recently only be acquired by the parish meeting adopting the Lighting and Watching Act, 1833. However, the Road Traffic Act, 1934 (*j*), conferred on county councils the power to enter into agreements with lighting authorities in urban or rural areas, or

(*h*) Trunk Roads Act, 1936, § 4.

(*i*) Restriction of Ribbon Development (Temporary Development) Act, 1943, § 1 (4).

(*j*) § 23.

otherwise to arrange for the lighting of county roads. Similarly, the Minister of Transport may make agreements for the lighting of trunk roads (*k*). Again, local authorities may under the Public Health Act, 1925 (*l*), provide street bins for the collection and temporary deposit of street refuse, erect and maintain seats and provide drinking fountains in streets; while an urban authority or a highway authority may provide street refuges and subways (*m*). The system of pedestrian crossing places is provided under schemes made by borough, urban district and county councils and confirmed by the Minister (*n*).

(v) Naming Streets and numbering Houses.—The naming of streets and the numbering of houses are important functions of urban authorities.

Under the Public Health Act, 1875 (*o*), urban authorities are required to cause houses and buildings in streets to be numbered, while the names of streets are to be put up or painted on houses at each end of the streets. The Act did not confer power to alter a name already given (*p*). This omission was made good by a provision in the Public Health Acts Amendment Act, 1907, empowering an urban or rural authority to alter the name of a street, but, in order to prevent any arbitrary exercise of this power, the alteration of name may only be made with the consent of two-thirds in number and value of the ratepayers in the street affected (*q*). This power is varied and extended by the Public Health Act, 1925, which authorises an urban authority to veto the proposed name of a street, as well as to make an order altering the name of any street, or assigning a name to any street to which a name has not been given. The exercise of any of these powers is subject to an

(*k*) Trunk Roads Act, 1936, § 6. (*l*) §§ 13 to 15.

(*m*) Road Traffic Act, 1930, § 55; Trunk Roads Act, 1936, § 6.

(*n*) Road Traffic Act, 1934, § 18.

(*o*) § 160, incorporating provisions of the Towns Improvement Clauses Act, 1847, §§ 64 and 65.

(*p*) *Anderson v. Dublin Corporation* (1885) 15 L.R.Ir. 410. See also *Collins v. Hornsey Urban Council* [1901] 2 K.B. 180; 26 Digest 567, 2604.

(*q*) § 21.

appeal to the justices (*r*). The powers under these sections supersede those given by § 21 of the Public Health Acts Amendment Act, 1907.

(vi) **Obstructive Trees, etc.**—The requirements of traffic have led to a number of special powers, two of which may be mentioned. The Public Health Act, 1925 (*s*), empowers a local authority to require the owner of a tree, hedge or shrub, overhanging a street or footpath so as to endanger or obstruct the passage of vehicles or foot passengers, to lop or cut the same within fourteen days, and failing compliance with the notice, the local authority may itself carry out the requisite work, and may recover summarily the cost from the owner or occupier. A similar power in relation to other highways is conferred by the Roads Improvement Act, 1925 (*t*), which authorises the Minister of Transport or the county council or other highway authority to impose restrictions on land at or near any corner or bend in a highway, where it is necessary for the prevention of danger arising from obstruction of the view of persons using that highway. For this purpose a notice is served upon the owner or occupier of the land. In the event of his objecting in writing, the matter is to be determined by arbitration if the parties so agree, or in default by the County Court.

Section 4.—BRIDGES

Introduction.—Apart from exceptional modern legislation affecting railways and other public undertakings, the law has not imposed upon public bodies or private persons the obligation to erect bridges for public use, but when once a bridge has been opened and used by the public, the convenience it afforded has led to a desire for its maintenance, and, if no other body or person could be held responsible, it has in the last resort been sought to throw the cost of its maintenance and repair, and if need be of its reconstruction, upon the public.

(*r*) Public Health Act, 1925, §§ 17 to 19.

(*s*) § 23.

(*t*) § 4.

The law with respect to bridges has naturally been closely associated with that affecting highways. The older bridges, built to remedy the inconvenience of crossing fords or shallow places in streams, were sometimes erected by persons for their own advantage, while in other cases bridges were provided by private or public bounty, sometimes from religious or charitable motives. These bridges were linked up with highways at either end and have become essential parts of the continuous highway.

Maintenance of Bridges.—Liability for the repair of bridges at common law formed part of the *trinoda necessitas* which, with the bearing of arms and the repair of highways, the law cast on every man (*u*). Apart from exceptional liability to repair based on tenure or prescription, this general responsibility seems to have been diversely performed in different parts of the country, the general rule being that the county was liable.

The Statute of Bridges, 1530.—To provide a better organisation for this important work the Statute of Bridges, 1530, was passed, which cast the first of their purely local government duties upon the justices of the peace. The Act contained two main provisions. In the first place it empowered quarter sessions to hear and determine indictments charging failure to repair bridges. This provided a more speedy remedy, where the person or body liable was known, than resort to the King's Bench or the assizes. Secondly, the Act provided for repair where it could not be established that a particular person, corporation or community was responsible. In such cases the liability was to fall on the county or borough in which the bridge was situated. For this purpose quarter sessions was empowered to levy rates, and it was enacted that the responsibility of the county or borough should extend to the repair of the highway leading to the bridge for the distance of three hundred feet on either side.

(*u*) Blackstone, *Commentaries*, Vol. I, p. 357.

The result of this legislation may be summed up by saying that where liability *ratione tenurae* or *praescriptionis* existed, it could be enforced at quarter sessions, and that in other cases the county or borough in which the bridge lay was required to repair through the medium of a rate levied by quarter sessions. But this Act still needed to be interpreted, and, as a result of the County Rates Act, 1738, which prevented resort to the county "bridge money" until after a formal presentment at quarter sessions or assizes of the disrepair of a county bridge, this interpretation came to be provided by the superior courts.

Liability of the County.—The first rule laid down was that the county was *prima facie* liable to repair all bridges in public highways unless it could show that some individual, corporation or community was already responsible (*v*). Thus bridges might be divided, in accordance with the liability to repair, into three classes: bridges for which some individual or corporation was responsible *ratione tenurae* or by prescription; hundred or parish bridges, whose repair had immemorially been performed by these communities; and county or borough bridges, being those public bridges whose repair was otherwise unprovided for. Problems then arose as to the liability to repair new bridges built by private individuals or communities and being of utility to the public and open to its use. The builders were obviously not responsible, since liability could not be rested on tenure or prescription. On the other hand, if a bridge over water was in a public highway or was of public utility, there was nothing to exempt the county or borough from its common law liability to repair (*w*), though the courts hinted at a possible method of enabling the county to avoid such a liability being saddled upon it, when they pointed out that for a man to build a new bridge in an existing highway would be indictable as a public nuisance (*x*). This in turn seems to

(*v*) *R. v. Inhabitants of Wilts* (1704) 6 Mod. Rep. 307; 26 Digest 572, 2636; *R. v. Inhabitants of Bucks* (1810) 12 East 192; 26 Digest 571, 2632.

(*w*) *R. v. Inhabitants of the West Riding of Yorkshire* (1770) 5 Burr, 2594; 26 Digest 588, 2785.

(*x*) *R. v. Inhabitants of the West Riding of Yorkshire* (1802) 2 East 342; 26 Digest 575, 2666.

have given rise to the requirement that the county should in some way have acquiesced in the building and public user of the bridge, such as by its failure to indict (y), so that the law has been stated to be

“that if a private bridge has been built by a private man for his private ends, and it turns out in course of time to be useful to the public and to be used by the public . . . those facts are strong and cogent (although not necessarily conclusive) evidence upon which a jury would be warranted in finding, and a judge would be justified in telling them that they might or ought to find (though not as a matter of law but as fact) adoption of the bridge by the county . . . , and consequent liability of the county to repair.”

This is made stronger

“if the bridge about which the dispute arises is part of an existing highway, and has its *termini* in the highway” (z).

Bridges Act, 1803.—A remedy relieving the county of the liability resulting from such embarrassing gifts was found in Lord Ellenborough’s Act (a). This Act provided that no bridge erected after the twenty-fourth of June, 1803, should be repairable at the expense of the county unless erected under the direction and to the satisfaction of the county surveyor, but even if so erected adoption by the county was still necessary to impose the liability upon it (b).

County Bridges.—The statutory powers and responsibility of the county justices for the maintenance and repair of county bridges was continued until 1888. Indeed, they were extended by various Acts. By the Annual Turnpike Acts Continuation Act of 1870 it was enacted that, where a turnpike road had become an ordinary highway, all bridges which were previously repaired by the turnpike trustees should

(y) *R. v. Inhabitants of St. Benedict, Cambridge* (1821) 4 B. & Ald. 447; 26 Digest 301, 317.

(z) *Per Lord Coleridge C.J. in R. v. Inhabitants of County of Southampton* (1887) 19 Q.B.D. 590, pp. 601–602; 26 Digest 575, 2672.

(a) The Bridges Act, 1803.

(b) *R. v. Inhabitants of County of Southampton*: *supra*.

become county bridges and be kept in repair accordingly. A change of outlook as between 1803 and 1878 was illustrated by the Highways and Locomotives (Amendment) Act, 1878. The Act of 1803, as already stated, authorised the justices to escape the responsibility of taking over bridges not erected to their previous approval; the Act of 1878 (c) enabled the county justices, if they thought fit, to take over the maintenance of a bridge which had already been erected, although it had not been built under the superintendence of the county surveyor as provided by the Act of 1803, if they certified it to be in good repair and condition. The county authority was also empowered to contribute out of the county rates not more than half the cost of any bridge thereafter to be erected, when the same had been certified under the Act of 1803 as a proper bridge to be maintained by the inhabitants of the county (d).

The Local Government Act, 1888, put an end to the long continued control of the county justices over county bridges. It transferred to the county councils (e) the administrative business of the county justices in respect of bridges and roads repairable with bridges and any powers vested by the Highways and Locomotives (Amendment) Act, 1878, in the county authority. The Act also granted additional powers to county councils. They were empowered (f) to purchase or take over on agreed terms then existing bridges which were not at that time county bridges, and also to maintain, repair and improve such bridges, and to erect new bridges, while (g) a bridge which carried a main road, if it was repairable by the highway authority, became wholly maintainable and repairable by the county council. To enable the county councils to carry out these additional duties they were given the powers of highway authorities.

By the Highways and Bridges Act, 1891, county councils and other highway authorities were authorised to make arrangements for the construction, alteration or freeing from tolls of bridges and their approaches.

(c) § 21.

(f) § 6.

(d) § 22.

(g) § 11.

(e) § 3.

Borough Bridges.—But counties were not the only authorities liable under the Statute of 1530 for the maintenance of bridges; the incorporated boroughs, at any rate if they possessed separate quarter sessions, had the same liability imposed upon them. Consequently, by the Municipal Corporations Act, 1882 (*h*), it was directed that every bridge in a borough, for which the borough and not the county was legally responsible, should be maintained, widened, or rebuilt under the sole management and control of the borough council. For this purpose the council was to be entrusted with all the powers which the justices had in respect of a county bridge.

The Local Government Act, 1888, in creating county boroughs, put the councils of such municipalities as regards the repair of bridges within their boroughs, which were previously repaired by the county or any hundred therein, in the same position as county councils.

Other Bridges.—But even this was not all the legislation relating to the maintenance and repair of bridges. The new highway legislation introduced by the Highway Act, 1835 (*i*), defined “highways” as including “bridges (not being county bridges),” and gave to highway authorities the same powers over such bridges as they possessed over highways (*j*). The Act also provided that, if a bridge should be built thereafter and become liable in law to be repaired by the county or part of the county, the highways leading to and crossing over the bridge should be repairable by the highway authority, and this provision has been held to mean that the liability for surface repairs to the roadway of the bridges and approaches fell upon the highway authority (*k*).

The results of this legislation may shortly be summed up.

(*h*) § 119.

(*i*) § 5.

(*j*) Nevertheless it has been held that a public bridge which had been repaired by the inhabitants of a hundred by immemorial custom was not a highway within the above definition, but was still repairable by the hundred: *R. v. Inhabitants of Chart and Longbridge* (1870) L.R. 1 C.C.R. 237; 26 Digest 571, 2631.

(*k*) *R. v. Inhabitants of Southampton County* (1886) 17 Q.B.D. 424; 26 Digest 586, 2766.

After 1888 public bridges over water maintained by local authorities fell into three classes. First, there were county bridges repairable by the county council or county borough council: secondly, borough bridges were maintained by the council of the borough in question: thirdly, other bridges were repaired and maintained by the highway authorities as parts of the highway.

Local Government Act, 1929.—The effect of the Local Government Act, 1929, in transferring the greater part of the powers of lesser authorities relating to highways to the county councils, has already been mentioned. In precisely the same way and to precisely the same extent it transferred their powers relating to bridges to the county councils, and the special provisions of the Municipal Corporations Act, 1882, in regard to borough bridges were repealed (*l*). So too, the Trunk Roads Act, 1936 (*m*), transferred the liability to maintain bridges in trunk roads to the Minister of Transport. Now, therefore, subject to the Minister's functions in respect of trunk roads, county councils maintain all public bridges in rural districts and all public bridges in classified roads situate in non-county boroughs or urban districts, and the control of these lesser authorities over these bridges must rest on delegation by the county council, or, in the case of urban authorities, upon the exercise of their claim to retain "county roads" (*n*). County boroughs remain as before, their councils maintaining all the public bridges situate in their areas.

Bridges Act, 1929.—The Bridges Act, 1929, was passed with the purpose of lessening difficulties which had arisen with respect to bridges in various parts of the country, more especially in rural areas. Large numbers of bridges along highways which were constructed many years ago were only adapted to meet the then requirement of the agricultural traffic of the district. These bridges are not able to carry present day traffic, with the result that many highways have

(*l*) Local Government Act, 1929, § 29.

(*m*) §§ 1 and 13.

(*n*) Local Government Act, 1929, §§ 30 to 35.

become useless for the purposes of any but light traffic. The Act does not throw upon the highway authority the responsibility for the future maintenance of such bridges, but it authorises the making of agreements between the highway authority and the owner of the bridge, under which the authority may contribute towards or assume the responsibility for the maintenance or reconstruction of the bridge or accept its transfer entirely (o).

In default of such an agreement either the owner or the highway authority may apply to the Minister of Transport, who is empowered to make an order for the reconstruction of the bridge or its future maintenance or its transfer to the highway authority. The order may contain such incidental provisions as appear to the Minister to be necessary or proper, and thus, in effect, takes the place of an agreement between the parties (p).

Road and Rail Traffic Act, 1933.—The same problem which dictated the provisions of the Bridges Act, 1929, is also responsible for § 30 of the Road and Rail Traffic Act, 1933 (q). Under that section the authority responsible for the maintenance of a bridge may by a conspicuous notice placed at each end of the bridge prohibit the use of an insufficiently strong bridge by certain classes of motor vehicles. The Minister of Transport may, upon appeal by a person or body of persons aggrieved, vary or remove the restriction, or he may refer the matter to an arbitrator who has the like powers.

Railway and Canal Bridges.—The bridges we have so far been considering form means of crossing water—the only obstruction which in earlier times necessitated the building

(o) § 2. For this purpose the highway authority is defined to be the council of any county, county borough, metropolitan borough, or urban district, and the Common Council of the City of London, while a bridge includes its abutments: § 14.

(p) Bridges Act, 1929, § 3, amended, as to trunk roads, by the Trunk Roads Act, 1936, § 3 and 2nd Schd.

(q) Amended, as to trunk roads, by the Trunk Roads Act, 1936, § 3 and 2nd Schd. This section is not yet in force.

of such structures. Modern methods of transport have, however, introduced new types of bridges and special legislation relating to them exists. Canal and railway companies have necessarily, for the carrying on of their undertakings, had to interfere with highways in every part of the country, particularly by construction of bridges beneath or over them, and for this purpose they have needed statutory powers. But a bridge so constructed, even under statutory powers, is really for the convenience of the builders although the public use it of necessity. Hence the liability to repair remains on those who constructed it. Those who interfere with the highway have a duty to see that it is not rendered less commodious than before, and the bridge is not a nuisance only so long as it is properly maintained (r). This common law duty has been reinforced by statute. The Railways Clauses Consolidation Act, 1845, contains the code of obligations usually imposed upon railway companies in connection with the construction and maintenance of their railways, and these general obligations have been incorporated, with or without modification, by special Acts. The Act of 1845 requires the provision over or beneath the railway of bridges in substitution for the highway which their works have rendered unsuitable, and the obligation to maintain the substituted roads (s) over their bridges extends to the common law distance of three hundred feet at each end of the bridge. Highway authorities are, however, empowered to enter into agreements with the proprietors of canal, railway or tramway undertakings providing for the adoption of such bridges as part of the highway over or under which they pass. They may also agree to construct any such bridges, either wholly or in part at the expense of the proprietors, or they may themselves contribute towards the costs of construction (t).

(r) *R. v. Inhabitants of the Isle of Ely* (1850) 15 Q.B. 827; 26 Digest 580, 2705.

(s) *London and North Eastern Railway Co. v. North Riding of Yorkshire County Council* [1936] A.C. 365; [1936] 1 All E.R. 692; Digest Supp. But this obligation is limited to the maintenance of such roads up to—and not beyond—the standard requisite for traffic at the date of interference with the highway; *A. G. v. Great Northern Railway Co.*, [1916] 2 A.C. 356.

(t) Public Health Act, 1875, § 147, amended by Local Government Act, 1929, §§ 30 and 31 and 1st Schd.

CHAPTER XXIV

RIVERS AND STREAMS

Rights of Riparian Owners.—The right of a riparian owner to the natural flow of water in and along a river or stream, undiminished in quantity and unpolluted, is recognised by the law and is capable of being enforced by recourse to the courts (a). True it is that the Legislature may and often does grant statutory powers for the collection and impounding of water in reservoirs constructed in the upper reaches of streams for the purpose of supplying water to the public in particular districts, but in such cases Parliament usually requires the promoters of the scheme to cause a specified and regular quantity of water to be discharged into the streams for the benefit of the riparian owners. This provision enures to the advantage of the riparian owners in ensuring that an adequate and regular flow of water will be discharged into the streams even in times of drought, while the reservoirs hold up a considerable quantity of water in times of flood and thus lessen the risk of damage to the river banks and adjoining land by storm waters.

Rights of the Public.—But beyond the preservation of private rights and apart from the construction and use of impounding reservoirs, the public has rights and duties in regard to rivers and streams. These rights and duties when properly asserted and fulfilled also benefit riparian owners, in a way and by means which they could not themselves effectively secure by action taken either individually or collectively. These interests of the public can only be properly dealt with by a public authority armed with statutory powers, and powers

(a) See, e.g., *Wood v. Waud* (1849) 3 Exch. 748; 44 Digest 37, 268; *Crossley & Sons, Ltd. v. Lightowler* (1867) 2 Ch. App. 478; 44 Digest 56, 401.

for such purposes have been conferred on local authorities or specially appointed bodies upon which local authorities have a considerable representation.

Statutory Restrictions.—The principal matters in respect of which statutory powers have been granted for the control of rivers and streams are of three kinds : (1) the preservation of the purity of fishing streams, the securing of which is entrusted to fishery boards ; (2) the prevention of the pollution of rivers and streams, a duty placed upon various local authorities, and (3) the protection of low-lying lands from damage by floods and storms, a duty entrusted to recently constituted catchment boards and to drainage boards, many of which are successors to authorities now largely superseded.

It is proposed briefly to refer to each of these classes as far as they concern local authorities.

(1) FISHERIES

Fishery Acts.—The preservation of the purity of fishing streams has long been a question of interest to the Legislature, and legislation for protecting streams containing salmon, trout and freshwater fish from fouling as well as from improper methods of fishing was embodied in numerous Acts which were repealed and re-enacted in the Salmon Fishery Act, 1861. Under that Act it was made an offence to cause or knowingly permit the flow into a salmon river of any liquid or solid matter causing the waters to poison or kill fish. The general superintendence of salmon fisheries throughout the country was vested in the Home Office, by whom inspectors of fisheries were appointed. The justices were authorised to appoint conservators or overseers for the preservation of salmon and for enforcing the provisions of the Act within the limits of their jurisdiction. Here, as in so many other cases, the local and national interests were provided for. The preservation of fish was a matter of concern for the counties rather than for the boroughs, and the justices were then the only effective county authority.

In 1865 it was determined that new fishery districts and organisations should be established, and by the Salmon Fishery Act of that year the justices were authorised to apply to the Secretary of State to form a fishery district. By this Act, the Home Secretary was empowered, on such application, to constitute as a fishery district all or any of the salmon rivers lying wholly or in part within the county, and to include in the district so formed any rivers or parts thereof which were not situated in the county. The justices were then to appoint a board of conservators for the district. If the fishery district extended into two or more counties, a joint committee of justices representing each county was authorised to be formed, by which in turn a board of conservators was to be appointed. In 1878 similar provisions were enacted in regard to trout and char (b), and in 1884 coarse fish were added (c).

In 1886 the duties and powers of the Central Department in relation to fisheries were transferred from the Home Office to the Board of Trade, and in 1903 to the Board of Agriculture and Fisheries, while the powers of the justices in relation to fish conservancy were transferred to county councils by the Local Government Act, 1888 (d).

The Salmon and Freshwater Fisheries Act, 1923, repealed previous Acts relating to fisheries, and consolidated and amended the law on the subject. Under this Act, the Minister of Agriculture and Fisheries may, provided application is made by (a) a fishery board, (b) a county council, or (c) persons who in the Minister's opinion are owners of one-fourth at least in value of the fisheries to be regulated, make an order for (*inter alia*) the creation of a fishery district and the constitution and incorporation of a fishery board for that district. Under this Act the Minister of Agriculture and Fisheries is empowered to make an order defining the area of the fishery district within which the order is to apply, and the constitution and incorporation of the fishery board he

(b) Freshwater Fisheries Act, 1878.

(c) Freshwater Fisheries Act, 1884.

(d) § 3.

has determined to set up (e). The boards are to consist of appointed members, representative members, and *ex officio* members (f). The representative members represent licensed fishermen, both netmen and rod and line anglers, and the appointed members represent the county councils, not more than five persons being appointed by them if the fishery board district is wholly within one county, and not more than three persons by any county council if the fishery district does not lie wholly within one county. *Ex officio* members are owners or occupiers of fisheries or owners of lands fronting to fishery waters of not less than a specified value (g). The fishery board is a body corporate with a common seal (h). It may make bye-laws, which are subject to the approval of the Minister of Agriculture and Fisheries, and issue licences to fish, and has wide powers to prevent illegal fishing or danger to fisheries (i). The accounts of a fishery board are audited by an auditor who is appointed by it, subject to the approval of the Minister, and paid by the board (j).

(2) POLLUTION OF RIVERS

Trade Effluents.—Before special legislation on this question was passed, manufacturers often made it a practice to discharge various waste products, sometimes of a noxious or injurious character, into rivers and streams adjacent or near to their manufacturing premises. Many local authorities also, by reason of inadequate provision or inefficient management of sewers and sewage disposal works, were accustomed to discharge into neighbouring streams solid or liquid sewage matter, sometimes wholly untreated and often very imperfectly treated. Many rivers thus became seriously polluted, and constituted a nuisance to landowners whose lands abutted on the lower reaches of the streams, as well as a menace to the health of the inhabitants of the districts through which the polluted streams flowed.

(e) Salmon and Freshwater Fisheries Act, 1923, § 38. (f) *Ibid.*, § 45.

(g) *Ibid.*, § 50. (h) *Ibid.*, § 52. (i) See also Diseases of Fish Act, 1937.

(j) Salmon and Freshwater Fisheries Act, 1923, § 57.

Rivers Pollution Prevention Acts.—In order to remove or at any rate to mitigate these evils, the Rivers Pollution Prevention Act, 1876, was passed. It was thereby made illegal (*k*) to discharge or knowingly to permit to fall into any stream, so as to interfere with its due flow or to pollute its waters, the solid refuse of any manufacturing process or from any quarry, or any rubbish or cinders or any waste or any putrid solid matter, or to cause or permit the flow into any stream of any solid or liquid sewage matter, or to discharge into any stream any poisonous, noxious or polluting liquid proceeding from any factory or manufacturing process. The Act also prohibited the discharge of noxious matter from mines into streams.

Concessions to Industry.—These drastic provisions were qualified to some extent in the interests of industry. In many instances manufacturers had established or developed their works on sites selected because of the recognised practice of disposing of trade refuse by discharging it into streams, and although it was not admitted that a right to commit such a public nuisance had been gained by long user, it was recognised that in some cases it would be impracticable to continue business if the prohibitive requirements of the Act were to be strictly enforced. It was also realised that even where the enforcement of prohibition was requisite it would be reasonable to allow sufficient time for the offender to re-arrange his works and processes to enable compliance with the requirements of the Act to be ensured. There was also the special position of the local authorities to be considered. In many cases they themselves were offenders, particularly as regards the discharge into streams of effluents from sewage works. Further, the local authorities were not always friendly towards traders, whom they might treat harshly, though in other cases special consideration might be shown to traders, to the serious detriment of other persons interested in the flow of the stream. For these reasons it was considered desirable that some leniency should be shown in special cases, and

the Act provided that in regard to manufactories and mines proceedings should not be taken save by a sanitary authority with the consent of the Minister of Health, and that if the sanitary authority refused to take proceedings the Ministry might order such proceedings to be commenced. Further, it was provided that the discharge of water from a mine in the same condition as that in which it had been drained or raised from the mine should not be an offence under the Act (*l*). The position of the manufacturer is further safeguarded to the extent that the Minister may not give consent to the institution of legal proceedings unless he is satisfied that means for rendering harmless the poisonous, noxious or polluting liquids proceeding from the processes of manufacture are reasonably practicable and that no material injury will be inflicted by such proceedings on the interests of the industry, and in giving or withholding his consent he is to have regard to the industrial interests involved in the case and to the circumstances and requirements of the locality (*m*).

A further concession was made to manufacturers, who, if unable to use the public sewers, might not be able to continue to carry on their businesses, by a provision in the Act requiring sanitary authorities to give facilities for the discharge of trade liquids into their sewers (*n*). These provisions were repealed by the Public Health Act, 1936 (*o*), and are now replaced by the more comprehensive terms of the Public Health (Drainage of Trade Premises) Act, 1937 (*p*).

Manufacturers are not protected from prosecution under the Act by any prescriptive right arising from long usage (*q*), and it has been decided in civil proceedings (*r*) that a right to pollute a stream either by prescription or under the doctrine of a lost grant cannot be maintained where the right claimed would be in contravention of a

(*l*) Rivers Pollution Prevention Act, 1876, § 5.

(*m*) *Ibid.*, § 6.

(*n*) *Ibid.*, § 7.

(*o*) 3rd Schd.

(*p*) See above, p. 508.

(*q*) *Butterworth v. Yorkshire (West Riding) Rivers Board* [1909] A.C. 45; 44 Digest 42, 301.

(*r*) *Green v. Matthews & Co.* (1930) 46 T.L.R. 206; Digest Supp.

statutory prohibition such as is contained in the Rivers Pollution Prevention Act, 1876. Nor can it be claimed since the Act that a natural watercourse has become a sewer by reason of the continued discharge into it of sewage (s).

Two points may be noted at this juncture :

(1) No proceedings may be taken in respect of manufacturing and mining pollutions, except by the sanitary authority with the consent of the Ministry, whereas no such limitation is fixed with regard to proceedings relating to solid matters and sewage pollutions.

(2) It may seem unusual that proceedings of possibly serious importance to sanitary authorities and to manufacturers and others should be authorised to be taken in the County Court (t), especially bearing in mind the power given to call in skilled parties to advise the Court and the heavy penalties which may be imposed for default in obeying an order made by that Court. On this it may be pointed out that the procedure obviously tends to a lessening of cost of proceedings, that in many of such cases the offence is necessarily admitted, and, lastly, that in any case of importance proceedings may be removed into the High Court and there tried in the first instance (u).

In 1893 a further Act, the Rivers Pollution Prevention Act, 1893, was passed to meet the case of sewage matter flowing into streams after passing through or along a channel vested in a sanitary authority. The decisions of the courts in certain cases had given rise to difficulties. For instance, in *A.-G. v. Dorking Union* (v), an old sewer not constructed by the local authority had discharged into a stream which by reason of other pollutions had been made still more foul. In proceedings taken against the local authority it was held that as it had not constructed the sewer, but had only permitted it to be used as formerly, it was not doing any act which could be restrained under the Public Health Acts or the Rivers Pollution

(s) *George Legge & Sons, Ltd. v. Wenlock Corporation* [1938] A.C. 204; [1938] 1 All E.R. 37; Digest Supp.

(t) Rivers Pollution Prevention Act, 1876, § 10.

(u) *Ibid.*, § 11.

(v) (1882) 20 Ch.D. 595; 41 Digest 42, 308.

Prevention Acts (*w*). The Act of 1893, presumably in order to overrule the effect of these decisions, provided that where sewage matter flows into a stream after passing through a channel vested in the local authority, the sanitary authority is to be deemed knowingly to permit the sewage matter so to flow (*x*), and thereby becomes liable to proceedings under § 3 of the Act of 1876.

Further Statutory Powers.—Apart from the provisions of the Rivers Pollution Prevention Acts, powers to prevent the pollution of streams are contained in various Acts, of which the following may be mentioned :

- (a) The Water Act, 1945 (*y*), the Gasworks Clauses Act, 1847 (*z*), the Public Health Acts, 1875 (*a*) and 1936 (*b*), and the Diseases of Animals Act, 1894, all contain powers to prevent the fouling of streams.
- (b) The Local Government Act, 1888 (*c*), confers on county councils the powers possessed by sanitary authorities under the Rivers Pollution Prevention Act, 1876, and empowers the Minister of Health, on the motion of one of the authorities concerned, to constitute a joint committee of county and county borough councils.
- (c) The Land Drainage Act, 1930 (*d*), empowers the Minister of Health to constitute a joint committee on his own motion.
- (d) The Salmon and Freshwater Fisheries Act, 1923 (*e*), confers upon fishery boards power to institute proceedings under the Rivers Pollution Prevention Acts.

It may be added that the enforcement of the provisions of the Rivers Pollution Prevention Acts has led to a considerable improvement in the freeing of rivers and streams from pollution.

(*w*) See also *A.-G. v. Birmingham, Tame and Rea District Drainage Board* (1881) 17 Ch.D. 685; 28 Digest 363, 11, and *Kirkheaton District Local Board v. Ainley, Sons & Co.* [1892] 2 Q.B. 274; 44 Digest 46, 325.

(*x*) § 1.

(*y*) Replacing certain provisions of the Waterworks Clauses Act, 1847.

(*z*) § 21.

(*a*) § 69.

(*b*) §§ 259 to 266.

(*c*) § 14.

(*d*) § 56

(*e*) § 55.

(3) LAND DRAINAGE

Bill of Sewers, 1531.—In modern speech the word “sewers” is usually taken to refer to drains or pipes taking liquid sewage matter from houses and premises for treatment or disposal at sewage disposal works, and as such is dealt with in the Public Health Acts. The Sewers Acts, upon which modern land drainage legislation is based, and which date back to the year 1531, have no relation to such sewers. They are concerned with the construction and maintenance of defensive works rendered necessary by floods in rivers and streams. That the flooding of low-lying lands is a very ancient mischief is evidenced by the preamble to the Bill of Sewers, 1531, which refers to the daily

“great damages and losses in many parts of the realm, as well by reason of the outrageous flowing and surges of the sea in and upon marsh grounds as also by occasion of land waters and other outrageous springs in and upon meadows, pastures and other low grounds adjoining to rivers, floods and other watercourses.”

The practice of issuing royal commissions of sewers dates from early times, but the Bill of Sewers authorised commissions of sewers to be granted on statutory authority, where needful, by the Crown, by whom also the respective commissioners were to be appointed. That the office was not always desired would appear from provisions contained in a subsequent Act (*f*) imposing penalties on persons refusing to act after being appointed commissioners. The duties of the commissioners were to maintain and repair all existing walls and sewers, to remove nuisances and to tax persons whose property derived advantage from the works of the commissioners according to the extent of their respective lands. It will thus be seen that taxation was to be according to acreage and was limited in its incidence to lands deriving benefit. The powers of the commissioners were obviously imperfect, and it would appear that defects in administration

(*f*) 25 Hen. 8, c. 10, § 1.

were due to two causes—first, that the machinery for carrying out the powers of the Act was imperfect and cumbersome, and second, the limited nature of the powers given to the commissioners.

The first of these difficulties is illustrated by the fact that the machinery set up under the Act was, in accordance with the then existing practice, judicial in form. Each body of commissioners was constituted a court of record, and required to proceed in judicial forms, so that it was necessary to have inquiries made and presentments of juries with regard to what persons should be ordered to carry out works at their own expense or what lands should be rated to meet expenses incurred by the commissioners (g). On the second point commissioners were not authorised to construct and maintain new protective works. Nevertheless, the facts that no substantial alteration in the law was made until the year 1861, and that the Bill of Sewers was not repealed until 1930, give reasonable ground for assuming that the early legislation was at least partially adequate. The provision of more effective defence works, the need for which was realised, was constantly checked by the fear of consequent increase of rates, and amending legislation before 1861 was largely directed to questions of rating and of cautious authorisation of new works.

Sewers Act, 1849.—The Sewers Act, 1849, authorised commissioners of sewers to partition their districts into sub-districts, and to make a separate rate for each district or sub-district. Thus the principle of differentiation was first introduced. More extensive powers for recovery of rates were also granted.

Land Drainage Act, 1861.—The Land Drainage Act, 1861, was an attempt to set the whole question of land drainage on a new and improved footing, and enabled the Crown, upon the recommendation of the Inclosure Commissioners (the

(g) A rate made by the commissioners of sewers without the presentment of a jury was held to be void : *Wingate v. Waite* (1840) 6 M. & W. 739; 38 Digest 83, 597.

forerunners of the Ministry of Agriculture and Fisheries), to direct the appointment of commissions of sewers for new areas, with extended powers in respect of both inland and maritime areas. The powers of commissioners of sewers comprised the cleansing and repair of watercourses or walls or defences against water, the deepening, widening and improving of watercourses, the removal of obstructions, and the provision of new watercourses or defence works. Powers of rating were granted to commissioners for defraying their costs and expenses, and the Act authorised a rate for maintenance work to be levied upon occupiers, whereas rates for improvement works or new works costing above one thousand pounds were to be levied upon owners (*h*).

To enable drainage works to be constructed and maintained for smaller areas than those usually assigned to commissioners of sewers, the Act of 1861 authorised the establishment of drainage boards for "any bog, moor or other area of land that requires a combined system of drainage, warping or navigation." Unlike the case of commissions of sewers, the procedure for forming drainage boards had to be initiated by the landlords themselves and the boards were elective.

Each drainage board when constituted became a body corporate with a common seal, and it had within its area all the powers of commissioners of sewers to the exclusion of any commissioners who had previously exercised powers therein. The board after its first constitution was elected by the votes of persons rated to the sewers rate of the district, the number of votes any person might give at an election being made dependent upon the rateable value of his property so rated.

Need for Further Powers.—In recent years there has been considerable anxiety on the part of owners and occupiers of lands abutting upon or near to the lower reaches of rivers and streams and of the local authorities of those districts as to the need for further powers to preserve lands from flooding. The question had not been handled seriously for many years

(*h*) Land Drainage Act, 1861, § 38.

because of the great expenditure which would in many places have been requisite. The long-standing depression in agriculture led to neglect of defence works in important districts and the position was aggravated by the shortage of labour during the period of the Great War. This was not made easier when—as was the fact in some districts—the duty of providing for the protection of lands in the drainage areas of a principal river and of its tributaries was imposed upon different drainage authorities. Further, there were differences in the value and efficiency of the operations of various drainage authorities. It was also urgently pressed by the owners and occupiers of rated lands that the areas of rating should be extended. The practice, dating back at least as far as the year 1531, that rating should be according to benefit or avoidance of danger, that is, that the lands deriving benefit from the works should alone be rated (*i*), was considered to be unfair in its application to modern conditions. It was represented that the owners and occupiers of lands in such limited areas could not and ought not to be asked to bear the cost of constructing and maintaining the requisite defence works; that it would be useless to continue further with merely patchwork efforts, seeing that adequate protection for the future could only be secured by means of expensive works of a permanent nature, and that the cost of such works would in many instances be almost as great as the value of the protected lands.

In these circumstances it was not unnaturally desired that the State should grant a considerable measure of financial assistance to landowners, or that the area of rating should be enlarged. In support of the latter submission it was urged by the owners and occupiers of the rated lands (sometimes referred to as the lowlands) that the owners and occupiers of the uplands ought to be rated, though not necessarily to the same extent as themselves, on the ground that, the river

(*i*) Even when the Ministry of Agriculture and Fisheries adopted, in connection with the setting up of drainage boards under the Land Drainage Act, 1918, a line of eight feet above the highest known flood level.

being one, and all the owners and occupiers of lands through which it runs from its source to the sea having the benefit of its flow, the uplands should contribute to the defence works in the lowlands. In reply to the view put forward on behalf of the uplands that this was not a matter of their concern, it was further contended that the building of towns and villages near the streams had tended to augment the extent of damage to the lowlands. In times of storm, it was asserted, the rain does not rush immediately from agricultural land into the stream, but a certain quantity percolates into the land and reaches the stream at a later time, so that the stream has not to bear the full flood of storm water at one time, whereas the rain water from the roofs of houses and buildings in the towns and villages and from imperviously formed roads has no opportunity of percolating into the soil, but is hastened to the stream and thus swells the immediate flow of storm water. This contention was objected to by the urban authorities as not being well founded, and led to considerable discussion.

Recourse to Local Acts.—In some districts local Acts of Parliament were obtained, by means of which county councils or specially constituted drainage boards were empowered to construct and maintain at public cost flood prevention works, but it was realised that the question needed to be looked at as a national problem and dealt with as such. These questions were finally settled by the Land Drainage Act, 1930, but partial attempts were made to cope with the difficulty by legislation passed in 1918, and again in 1926.

Land Drainage Act, 1918.—By the Land Drainage Act, 1918, the Board (now Ministry) of Agriculture and Fisheries was authorised, either on its own initiative or on the petition of (a) the proprietors of one-tenth of the area, or (b) of the existing drainage authority, or (c) of any county council or county borough council affected, to constitute a drainage district or alter the area of an existing drainage authority, including a commission of sewers. The procedure was by

way of provisional order, subject to parliamentary confirmation in case of opposition.

The following powers were granted by the Act :

(a) Drainage authorities governed by the general law were expressly authorised to rate either by acreage or on annual value, and provision was made for differential rating or for exemption from rating of part of any drainage area (*j*). This did not, however, extend the area to be rated, but merely empowered the drainage authority to alter the incidence of rates between different parts of the area already liable to be rated.

(b) Public health and highway authorities were given powers to contribute, with the sanction of the Ministry of Health, to the expenses of drainage schemes which might be of benefit from the point of view of public health or in connection with the highways (*k*).

(c) Drainage authorities were authorised, by order made by the Board of Agriculture and Fisheries, subject to the consent of the Ministry of Transport, to take over, in whole or part, the powers and duties of a navigation authority, or to interfere with a navigation authority's works, by arrangement between the two authorities (*l*).

(d) Two adjoining authorities might make arrangements for either to execute works within the other's area (*m*).

Part II of the Act of 1918 gave extended powers to the Ministry to enforce effective land drainage where either persons liable for the maintenance of banks and drains or a drainage authority had committed default, and the Ministry was also authorised to carry out schemes for the drainage of areas too small to be constituted separate drainage districts. The Ministry was empowered to delegate its powers under Part II of the Act to committees, the majority of the members of which were required to be members of the councils of the county and county boroughs affected. These powers were, subject to certain restrictions, transferred wholly to the councils by the Land Drainage Act, 1926.

(*j*) Land Drainage Act, 1918, § 4.

(*l*) *Ibid.*, § 6.

(*k*) *Ibid.*, § 5.

(*m*) *Ibid.*, § 8.

Royal Commission of 1927.—The whole question of land drainage was considered by a Royal Commission appointed in 1927, whose reference was to inquire into the law on the subject and its administration, to consider and report whether any amendment of the law was needed to ensure an efficient system of arterial drainage without any undue burden being placed upon any particular section of the community, and to make recommendations having regard to all the interests concerned. The Commission duly presented a Report ⁽ⁿ⁾ upon which the Land Drainage Act, 1930, was based. This Act repealed all previous outstanding legislation on the question and set up a new class of authority with a policy freed from many of the previously existing disabilities.

Land Drainage Act, 1930.—The Land Drainage Act, 1930, deals with the whole question of land drainage comprehensively and on national lines. The intention of the Legislature expressed in the Act is that throughout the country there shall be authorities exercising similar powers of effective control of land drainage in clearly defined areas. As these areas do not correspond with the areas of either county or county boroughs, recourse is had to the appointment of *ad hoc* authorities on which county councils and county borough councils have substantial representation. The machinery of the Act is that general and wide powers of supervision and direction are given to the Minister of Agriculture and Fisheries ; that authorities called catchment boards are appointed to discharge the duties of drainage authorities in the drainage areas of specified rivers or groups of rivers, and that subsidiary drainage boards, known as internal drainage boards, may be appointed to carry out duties in smaller areas generally forming parts of catchment areas. As is customary in modern legislation, power is given to the Central Department, in this case the Minister of Agriculture and Fisheries, to define additional areas and, if he thinks fit, to combine or re-arrange existing

⁽ⁿ⁾ *Report of the Royal Commission on Land Drainage in England and Wales* : Cmd. 2993.

areas. The Act directed that forty-seven catchment areas, each of which receives the drainage of a specified river or group of rivers, should each be defined on a map to be prepared by the Minister, on which should be indicated by a distinctive colour the river and channel which for the purposes of the Act are to be deemed the main river. For each catchment area, a board, known as a catchment board, is set up. Except in the case of the Thames and Lee, as to which special provision is made (*o*), the catchment board is constituted by order of the Minister. Each catchment board consists of not more than thirty-one members (*p*). One member is appointed by the Minister, and at least two-thirds of the remainder by the county councils and county borough councils in the area, but so that the representation of the county boroughs is not to exceed that of the counties. The remaining members are appointed by the Minister to represent the internal drainage boards within the catchment area, and any portion of that area for which drainage boards might be, but have not been, constituted. The Act does not constitute the catchment board the sole drainage authority within the catchment area. There are within most catchment areas drainage districts which are described as internal drainage districts. Drainage boards in existence at the time of the passing of the Act are to be treated as if constituted under the Act, taking their places as the authorities governing internal drainage districts under the supervision of the new catchment boards (*q*), while commissioners of sewers are, until abolished under the Act, entitled to exercise their existing powers and in addition all powers given to drainage boards by the Act (*r*).

Catchment Boards.—The catchment boards and the drainage boards are bodies corporate. The catchment boards exercise a general supervision with respect to the

(*o*) The drainage board of the Lee catchment area consists of the Lee Conservancy Board with the addition of representatives of various county councils and one person appointed by the Minister, while the Thames Conservators are the drainage board of the Thames catchment area.

(*p*) Land Drainage Act, 1930, § 3.

(*q*) *Ibid.*, § 1 (4).

(*r*) *Ibid.*, § 83.

drainage of their catchment areas (s), undertake the construction and maintenance of drainage works in connection with the main river and its banks to the exclusion of every other authority, and secure an adequate outfall for the main river (t). Where a catchment area abuts on the sea or any estuary, the catchment board may construct all such works and do all such things in the sea or in the estuary as may in its opinion be necessary to secure an adequate outfall from the main river.

A catchment board is also required to submit to the Minister a scheme for certain other purposes more closely allied with its obligations to supervise its district. In effect the catchment board is required to review its area and (a) satisfy itself that all its lowland districts are in fact under internal drainage boards, or for this purpose to alter boundaries, to constitute new internal districts, and possibly to amalgamate existing districts ; (b) to abolish all commissioners of sewers and bring their areas under elective drainage boards ; and (c) to re-constitute any internal board not yet upon an elective basis. All such schemes require the confirmation of the Minister before becoming operative and, if objections are raised at certain stages, orders cannot take effect until confirmed by Parliament (u).

The catchment board has a two-fold duty. In the first place, it is the sole drainage authority for the main river and as such exercises exclusive control over works constructed in it. Secondly, it is the body charged with the general supervision of the drainage of the whole catchment area, and as such exercises considerable control over the activities of its internal drainage boards. Thus it may give directions for the guidance of internal drainage boards, and must see that the works of one of these latter boards do not interfere with those of another.

Catchment boards were required to submit to the Minister within a period to be appointed by him schemes providing for the transfer to themselves of the powers, duties, obligations and

(s) Land Drainage Act, 1930, §§ 1 (3) and 7.

(u) *Ibid.*, § 4.

(t) *Ibid.*, § 6.

liabilities in connection with the main river which before the commencement of the Act were vested in any then existing drainage authority (v).

Expenses.—A catchment board obtains its funds from two sources, (a) by precept requiring each internal drainage board within its area to make such contributions towards the catchment board's expenses as the catchment board may consider to be fair, and (b) by precept requiring each county council and county borough council, whose district is wholly or partly within the catchment area, to contribute the remainder of its revenue, the necessary sum to be provided by each of these authorities being based upon the rateable values of those portions of the councils' districts which are situate within the catchment area. Except in certain circumstances, however, the amount for which each council may be precepted must not exceed the product of a rate of two pence over that portion of the council's area which is situate within the catchment area (w). The expenses of an internal drainage board are met by an owner's drainage rate to cover the cost of new works, of the improvement of existing works and of contributions made to the catchment board, and by an occupier's drainage rate in the case of any other charges. Both the owner's rate and the occupier's rate are levied on the occupier, who, however, is entitled to recover from the owner any amount paid by him on account of an owner's rate (x).

Minister's Powers.—It will have been seen from what has already been stated that the powers of general supervision and authority of the Minister of Agriculture and Fisheries in respect of land drainage matters are considerable. He had to define the boundaries of the catchments specified in the Act,

(v) Land Drainage Act, 1930, § 4.

(w) The maximum amount which may be demanded by precept is the gross product of a twopenny rate, the costs of collection not being deducted: *R. v. Cambridgeshire County Council* [1937] 1 K.B. 201; [1936] All E.R. 352; Digest Supp.

(x) Land Drainage Act, 1930, §§ 20 and 24.

and he may, on the application of, or after consultation with county councils or county borough councils, alter the boundaries of catchment areas or create new areas. He may also by order constitute new drainage boards for any area outside a catchment area capable of deriving benefit or avoiding danger as a result of drainage operations. He appoints, after consultation with, and after taking into consideration nominations by the internal drainage boards, practically one-third of the members of a catchment board, and to him certain schemes of catchment boards are submitted for approval and confirmation. He is the tribunal of appeal in the case of certain matters of dispute arising between catchment boards and internal drainage boards. He may, on petition from a catchment board, transfer to that board the property and functions of an internal drainage board in its area. In case of neglect by a catchment board of its duties he may give directions to the board requiring the due performance of its duties. All catchment boards as well as drainage boards are required to send to the Minister an annual report of their proceedings and a copy of their audited accounts.

Lastly, the Minister may make grants towards expenditure actually incurred or advances on account of expenditure to be incurred by catchment boards in the improvement of existing works or the construction of new works. It will be noted that the grants are not based on percentage of cost nor in fact is there any promise that grants will ever be made. But the fact that grants may be made at the will of the Minister should be effective to secure a large measure of control of expenditure and supervision of all projected works.

County Councils and County Borough Councils.—The substantial representation of county councils and county borough councils upon catchment boards has already been alluded to. Apart from such representation they have powers, as respects land in their own areas and not within the jurisdiction of a catchment board, to take over the powers of defaulting drainage boards, to enforce the obligations of any

person to repair watercourses, bridges or drainage works and to require the removal of obstructions in watercourses. They may in their own areas (either within or without a catchment area) take steps to have watercourses put in proper flow when that flow is impeded to the detriment of agricultural land. They may make schemes for and carry out drainage works within their own areas (either within or without a catchment area) which are too small to justify the constitution of a drainage district under the Act, and they may delegate to committees their powers under the Act except the power to levy a rate or to borrow money. The powers and duties of a drainage board outside a catchment area may be transferred by the Minister to the council of a county in which its area is situated.

County councils and county borough councils have discretionary powers as to the area over which their contributions to the expenses of catchment boards may be raised. These contributions may be charged either as expenses falling on the whole area of the council and payable out of the county rate or general rate, as the case may be, or on such parts of the county or county borough in the catchment area as the council thinks fit, or by differential rates charged on such parts of the county or county borough in the catchment area as the council thinks fit.

Rating.—Further in relation to rating by drainage boards, not being catchment boards, the Act provides that when any hereditament is unoccupied the owner is to be deemed for this purpose to be the occupier, and every rate made by a drainage board is to be assessed on the basis of annual value at a uniform amount per pound throughout the area, (a) in the case of agricultural land on the annual value of the land, and (b) in the case of any other land on one-third of the annual value thereof. There is a further power enabling a drainage board to order that its district shall be divided into sub-districts which shall be subjected to differential rating and that no rates shall be levied on the occupiers of hereditaments in any portion of the district which in the board's opinion,

either by reason of its height above sea level or for any other reason, ought to be exempted from rating.

It will be seen then that a novel principle has been introduced into the law of rating, that lands not directly deriving benefit by the protective works of the board may yet be chargeable ; that one rating authority may fix the amount of contribution to be made towards the cost of maintenance of its works by another authority, and that an occupier may be exempted by the drainage authority from liability to pay drainage rates. In all these cases it is sought to prevent unfairness by giving to persons and bodies aggrieved a right of appeal to the Minister of Agriculture and Fisheries.

CHAPTER XXV

POLICE

History.—Though the old petty constables compelled to serve unpaid have disappeared with the coming of the modern disciplined professional police forces, their history and legal position need some explanation, for, as Maitland said (*a*),

“It is well to remember that the constable is an officer long known to our common law; a great part of the peculiar powers of the modern policeman are due to this—that he is a constable, and as such has all those powers with which for centuries past a constable has been entrusted by law.”

Frankpledge.—At the time of the Conquest a rudimentary system of police was provided by the institution of frankpledge. This required every man (with some exceptions) over the age of twelve years to be a member of a tithing, or group of ten, the members of which were mutually responsible for each other's good behaviour. As Coke (*b*) said,

“This frankpledge consisted most commonly of ten households . . . whereof the masters of nine families (who were bound) were . . . called . . . frankpledge and the master of the tenth household was . . . called . . . chiefe pledge (*c*) and these ten masters of families were bound one for anothers family, that each man of his severall families should answer for the injury or offence by him committed.”

This system of mutual sureties for the production of wrongdoers was supplemented by the duty cast upon every township to see that each of its inhabitants was in a tithing,

(*a*) *Constitutional History of England*, p. 236.

(*b*) *Second Institute*, p. 72.

(*c*) Or tithing man, head-borough, borsholder, etc.

and the due working of the institution was supervised in the sheriff's tourn or leet (*d*).

Police Duties of Township and Hundred.—In addition to its duties in connection with frankpledge the township had other positive duties of a police nature to perform. It was bound to arrest malefactors, to raise the hue and cry and to present criminals at the proper courts having jurisdiction to try them (*e*). Similarly, the hundred was placed under a peculiar liability by the law of William I. If a man was slain, the hundred had either to produce the murderer or pay a fine unless it could be shown that the murdered man was English and not Norman. In 1285 the Statute of Winchester added the obligation of producing persons committing robberies within the hundred (*f*). To show that these duties had been adequately performed the township was required to appear by its reeve and four men at the sheriff's tourn and before the justices in eyre, while the hundred appeared at the eyre by its jury of twelve.

The police power in early times was closely connected with the military forces of the country and further development must be sought for a time in connection with the latter branch of State activity. In the early Middle Ages the arrest of malefactors might take on the appearance of an act of war and the criminal might be difficult to distinguish from the rebel. As time passed a differentiation took place; the *fyrð*, the national force in which every man must serve in defence of his country, became more purely military until it was developed by legislation into the militia, while the officers, appointed at first rather for military duties, tended to become concerned solely with the civic duties of police (*g*).

Creation of Constables.—Early legislation disregarded the older system of frankpledge and imposed upon townships

(*d*) See above, p. 10: Pollock & Maitland, *History of English Law*, Vol. I, 2nd ed., pp. 568–571.

(*e*) Pollock & Maitland, *op. cit.*, p. 564.

(*f*) *Ibid.*, p. 558.

(*g*) Maitland, *op. cit.*, p. 235.

and hundreds duties of a semi-military nature, at the same time providing for the appointment of constables to see to their due discharge. The Assize of Arms of 1181 attempted to reorganise the old Saxon *fyrð* and required every man to provide himself with arms and armour suitable to his station. In 1233 an Ordinance required nightly watches to be kept by four men in each township. In 1252 another Ordinance repeated and elaborated both these sets of provisions, thus paving the way for the Statute of Winchester of 1285, which summed up the earlier legislation and gave to the constabulary and militia the structure they were to retain throughout the remainder of the Middle Ages (*h*). The mention of constables is first made in the Ordinance of 1252. It decreed that in every township a constable or two constables should be appointed to see to the due execution of the Assize of Arms, and that in every hundred there should be a chief or head constable to call together the force so provided and equipped. Whether these township constables were new officers or merely the older chief pledges called by a new name is uncertain, as is also the place and manner of their appointment, whether in the tourn, or in the leet, or by the township. It is clear, however, that in many places they superseded and absorbed the older officers of the township, though, where both continued to exist side by side, the chief pledges were regarded as subordinates to the constables, having less wide powers (*i*).

Appointment.—Leaving on one side the military implications of this legislation, we may concentrate our attention on the constables. In each hundred, high, head, or chief constables were appointed, apparently at the sheriff's tourn. Petty constables seem generally to have been appointed at the leet (*j*). Their civil duties were primarily dependent upon the fact that within their jurisdiction they were, together with the chief

(*h*) Pollock and Maitland, *op. cit.*, p. 565; Maitland, *op. cit.*, p. 276.

(*i*) Blackstone, *Commentaries*, Vol. I, p. 357; Holdsworth, *History of English Law*, Vol. IV, p. 123; Maitland, *op. cit.*, p. 276.

(*j*) In later times their appointment in these courts was regarded "as of common right": see Comyn's *Digest*, "Leet," M. 5; Burn's *Justice*, "Constable"; Blackstone, *op. cit.*, pp. 355-356.

pledges, conservators of the peace with the duty of preserving the peace and the right of arresting its breakers (*k*). The introduction of justices of the peace (*l*), also charged with the preservation of the peace, naturally brought about a situation tending to bring the older constables under their control, and this even in the later Middle Ages, with the decay of the older system of local government, went so far as to put the appointment and removal of constables in the hands of the justices. High constables came to be appointed and removed by quarter sessions, except where the existence of a franchise served to keep alive a hundred court (*m*). Petty constables, on the other hand, though properly appointed at the leet, also began to be appointed by the justices where leets had ceased to be held, so that in later times the justices' right of appointing petty constables came to be regarded as resting upon common law (*n*). This power of appointment was put upon a statutory basis in 1662 (*o*), when two justices were empowered to appoint petty constables where the leet made default. The decay of leets also had another important influence on the position of petty constables. Not only did they come more closely under the control of the justices, but they also ceased to be identified with the township. The Statute of 1662 helped to identify them instead with the parish by empowering them to levy a parochial rate to defray their expenses, and the change was exemplified in many places by the practice of permitting the vestry to nominate persons for appointment by the justices (*p*).

Duties of Constables.—Though they thus became parochial officers the petty constables were very definitely under the control of the justices who appointed them, and who came to look upon them as their executive officers to act under their orders and to execute their warrants. The high constables under the same influence came to assume a position of superiors

(*k*) Blackstone, *op. cit.*, p. 350.

(*l*) See above, p. 14.

(*m*) Holdsworth, *op. cit.*, p. 125; cf. Blackstone, *op. cit.*, p. 355.

(*n*) Burn's *Justice*, "Constable."

(*o*) Stat. 13 & 14 Car. 2, c. 12.

(*p*) Holdsworth, *op. cit.*, pp. 123-124, 158.

to the petty constables in the hundred, and were most frequently used for the collection of the county rate from the overseers of each parish. The position of executive officers of the justices, which petty constables had attained by the seventeenth century, served to emphasise that these officers were now solely concerned with the preservation of the peace and had no longer military duties to perform.

The old duties of watch and ward still remained until the modern police forces were set up. These duties are explained by Blackstone thus (q) :

“Ward, guard or *custodia*, is chiefly intended of the daytime, in order to apprehend rioters, and robbers on the highways : the manner of doing which is left to the discretion of the justices of the peace and the constable, the hundred being answerable however for all robberies committed therein, by day light, for having kept negligent guard. Watch is properly applicable to the night only . . . and it begins when ward ends, and ends when that begins . . . The constable may appoint watchmen at his discretion, regulated by the custom of the place, and these, being his deputies, have for the time being the authority of their principal ” (r).

From their position as conservators of the peace the constables had many important duties to perform and peculiar powers, such as their right of arrest. Blackstone (s) somewhat cynically remarked of the eighteenth-century constables, that, “considering what manner of men are for the most part put upon these offices, it is perhaps very well that they are generally kept in ignorance ” of the extent of their powers.

Reorganisation of Police.—While the inefficiency of the police was thus notorious, events were moving in the later years of the eighteenth and the beginning of the nineteenth centuries which made it impossible for it to be continued. Towns were growing in size and importance as the industrial revolution was attracting workers from the country districts, and for

(q) *Op. cit.*, pp. 356–357 ; see, too, Burn’s *Justice*, “Watch.”

(r) These watchmen were, of course, unpaid and compelled to serve in their turn.

(s) *Op. cit.*, p. 356.

purely local considerations the strengthening of the forces of law and order was necessary. But the national aspect of the question called still more imperatively for attention, and the Government could not neglect its importance. It was a time of prolonged war, checked at times by a delusive peace, and when peace eventually came no preparation had been made for it. Bad harvests and unemployment caused discontent with prospects of rioting and possible revolution, and it was necessary that there should be a police force available to cope with emergencies. It is interesting to note how, from both these standpoints, the problem was approached. Generally it may be said that it was about half a century before it was realised that a professional full time police force was the only effective instrument for achieving these purposes. Before that time expedients were adopted, on various lines, but all with the object of utilising the existing system with as few additions as possible ; the fear of additional charges on the rates, in this, as in other directions, checked the adoption of more statesman-like views, and it may be that such broad views were not then within general comprehension.

In the City of London a rudimentary force had been established by an Act of 1736 (*t*), but it consisted of bedells and watchmen and became incapable of meeting the requirements of that community. The Government, conscious of the importance of keeping the Metropolis under control, passed legislation in 1829 for the establishment of a police force in the metropolitan area, and placed it under the control of the Home Secretary—a control which has continued to the present time. This example was not followed in respect of any other part of the country. Two ideas were, however, adopted—one was to have a body of auxiliaries able in times of emergency to support the existing constables, who, it was considered, were capable of dealing with the requirements of ordinary occasions, and this was put into practice in 1831. The other idea was to secure a better type of parish constable, and legislation was passed in 1842 for effecting this purpose. Both

(*t*) Stat. 10 Geo. 2, c. 22.

these methods proved ineffective to meet the needs of a growing community. Special constables were not usually available for effective service when emergencies arose, while the parish soon became an inadequate unit for controlling a proper police force, and, when the spirit of reform compelled the passing of the Reform Act, 1832, the establishment of an efficient police force became inevitable. For the first time it was realised that a disciplined full time force was alone capable of affording adequate protection and service. In 1835 this policy was imposed upon the municipal corporations. The experience gained in the boroughs encouraged the setting up of similar forces for the counties, and this was made optional in 1839, and compulsory in every county in 1856. The City of London, desirous of obtaining the like advantages, but still intent on preserving its own self-government, obtained a more efficient police service than that provided by its old watch and bedells by a police force of its own under a commissioner of police set up under the provisions of a local Act (*u*). Before 1872 it was recognised that the parish constable was unnecessary, though in that year legislation made it possible that he might be resuscitated if circumstances made it desirable. The special constable is still available in times of emergency, but the country's confidence is rested on the ordinary professional force. We may now consider the development of our police system in greater detail.

Parish Constables.—The Parish Constables Act, 1842, authorised justices in February of every year to issue a precept to the overseers requiring them to make out and return a list of suitable men to serve as constables. The overseers were thereupon required to summon a meeting of the inhabitants in vestry when such a list was prepared. Able-bodied men resident in the parish, whose ages were between twenty-five and fifty-five and who were rated on tenements of the net yearly value of four pounds or upwards, were made liable to serve as parish constables, and, though the Act permitted of numerous

(*u*) City of London Police Act, 1839.

exemptions, the principle was retained of the office of constable being compulsory upon the person appointed. The establishment of full time police officers led to the appointment of parish constables being less frequently made, except in times of emergency, and the Parish Constables Act, 1872, after reciting that the establishment of an efficient police in the counties had rendered the general appointment of parish constables unnecessary, enacted that parish constables should not in future be appointed unless quarter sessions should determine that such appointments were necessary. Parish constables appointed under the Act were to be subject to the authority of the chief constable of the county, and the parish council (*v*) might apply for the appointment of a parish constable.

Special Constables.—The Special Constables Act, 1831, was passed with the intention of supplementing the services of the ordinary officers appointed for preserving the peace, by the appointment in times of tumult, riot, or felony, actual or apprehended, of “special constables” nominated by the justices from among the householders. A special constable so nominated was to have and exercise all the powers and responsibilities of a duly appointed constable. In this connection extensive powers were conferred on the justices. They were authorised to make orders and regulations for making the special constables more efficient, they might fix reasonable allowances to be paid to special constables for their trouble, loss of time and expenses, and they might suspend or determine their services. The interest of the State in the maintenance of the peace locally in exceptional times was recognised in the requirement that notice of the appointment of special constables under the Act was to be sent to the Home Secretary, who was authorised to require persons to be sworn in who were otherwise exempt from such liability (*w*).

The Special Constables Act, 1838, authorised two or more

(*v*) Local Government Act, 1894, § 6.

(*w*) The Act of 1831 was extended by the Special Constables Act, 1835, which enabled persons willing to act as special constables for a parish to be so appointed though not resident in the parish.

justices to appoint special constables to protect the property of railways, canals and other public works at the cost of the undertakers.

The Special Constables Act, 1923, made permanent the provisions of the Special Constables Act, 1914, which was passed as a war measure. By the operation of these two Acts His Majesty may by Order in Council make regulations for the appointment of special constables under the Special Constables Act, 1831, or under § 196 of the Municipal Corporations Act, 1882 (*x*), and this may be done although a tumult, riot or felony is not immediately apprehended. Provision may be made for the payment of allowances or gratuities to constables injured or killed or to the dependants of those killed. Any such Order in Council is to be laid before Parliament and is not subject to the procedure laid down in the Rules Publication Act, 1893.

Additional Constables.—By the County Police Act, 1840, it was made lawful for the chief constable of any county, with the approval of the justices in quarter session (*y*) on application of any person showing the necessity thereof, to appoint and cause to be sworn in any additional constables at the charge of the person making such application but subject to the orders of the chief constable and for such time as he should think fit.

County Police.—The county police force was first introduced by the County Police Act, 1839, under which the justices in quarter sessions were authorised (*z*) with the consent of the Home Secretary to constitute a professional force. Rules for government, pay and clothing of such constables were to be made, on similar lines as far as possible, by the Home Secretary. The justices were required, with the approval of the Home Secretary, to appoint a chief constable

(*x*) Which requires borough justices to appoint special constables in the borough in October of every year.

(*y*) Now the standing joint committee: Local Government Act, 1888, § 9.

(*z*) Though not required.

for the county, who was to be liable to dismissal by the justices. Subject to the approval of two or more justices in petty sessions, the chief constable was to appoint the other constables for the county. The chief constable and the constables appointed by him were to be sworn in, and thereupon to have the powers and duties of constables throughout the county and any adjoining county.

This Act was amended in the following session by the County Police Act, 1840, which also was not compulsory. While these Acts were put into operation in various counties they were not universally applied, and the County and Borough Police Act, 1856, was passed to make the establishment of a county police force obligatory in every county and to make compulsory the provisions of the County Police Acts, 1839 and 1840. This Act also introduced the principle of a State grant to county and borough police forces maintained in a state of efficiency in point of numbers and discipline (*a*) which has so greatly affected the subsequent history of the police organisation.

By the Local Government Act, 1888 (*b*), the powers and duties of justices with respect to county police were transferred to the standing joint committee, which, as previously explained (*c*), consists of equal numbers of representatives of the county council and of quarter sessions.

The standing joint committee with the consent of the Home Secretary determines and may vary the number of constables for the county. On a vacancy arising in the position of chief constable, the committee, subject to the approval of the Home Secretary, makes a fresh appointment and has the right of dismissal of that officer. Subject to the approval by the Committee of the establishment the chief constable appoints the superintendents and constables of the force. The chief constable is required to make quarterly reports to the standing

(*a*) § 16.

(*b*) § 9.

(*c*) See p. 54.

joint committee concerning the police. The committee may divide the county into police districts and declare the number of police to be assigned to each police district.

The standing joint committee, as against the county council, has exclusive control of buildings and premises used for quarter sessions and police purposes for the county and of all questions relating to the maintenance and repair of such premises. The county council cannot veto the requirements of the standing joint committee in such matters and must raise and pay such sums as the committee in its discretion may expend in and about such buildings and premises (*d*).

Consolidation of Forces.—When the Municipal Corporations Act, 1835, was passed into law it was intended that its provisions as to police should be in force in all municipal boroughs to which the Act applied, and the Act provided accordingly. Subsequent policy has invariably been in the direction of transferring police powers and police forces from the councils of the smaller boroughs to the county police authorities. Indeed, this policy was first indicated in the County Police Act, 1840, which empowered the justices (*e*) for a county and the council of a borough in or adjoining the county to consolidate their police establishments. In such cases the chief constable of the county was to be in control of the consolidated force. Any agreement to this effect was subject to determination by six months' notice on either side, but in 1856 it was enacted that no such agreement should be terminated without the sanction of the Home Secretary, who was further authorised, on the application of the council of a borough, to settle terms of consolidation of forces when the county justices had not agreed thereon (*f*). The Act of 1856 also provided that a borough with a population not exceeding five thousand, which had not consolidated its police force with the county police, should not

(*d*) *Ex parte Somerset County Council* (1889) 58 L.J.Q.B. 513; 33 Digest 108, 219.

(*e*) Now the standing joint committee: Local Government Act, 1888, § 9.

(*f*) County and Borough Police Act, 1856, §§ 5 and 20.

receive the Treasury grant towards the cost of the maintenance of the force, and thus in effect these small boroughs were compelled to give up their police forces. In further pursuance of the policy of consolidation, the Local Government Act, 1888, deprived boroughs with populations under ten thousand of their police powers and police forces and transferred them to the counties (*g*), while it was provided by the Municipal Corporations Act, 1882 (*h*), that on the granting of a charter for the incorporation of a borough, a new police force not consolidated with the county police force should not be authorised if the new borough had less than twenty thousand inhabitants. More recently (in 1920 and 1932) the question of still further reducing the number of police authorities was considered and favourably reported upon by committees appointed by the Home Secretary, but no legislative action in this respect was taken until the recent introduction of the Police Bill, which provides for the abolition of all remaining non-county borough forces and gives the Home Secretary quite extensive powers to amalgamate even county and county borough forces.

Borough Police.—The Municipal Corporations Act, 1882, re-enacting the provisions of the Act of 1835, requires the council of a municipal borough (except, as already stated, those with a small population and those in which agreements for consolidation with the county force are in operation) to appoint a watch committee, consisting of the mayor and not more than one-third of the members of the council. This committee may be appointed for such time as the council thinks fit. It is usually appointed on the ninth of November in every year, when the council, newly reinforced by the councillors who have been elected on the first of the same month, appoints its standing committees. The watch committee's duties are to appoint a sufficient number of borough constables and to frame regulations for preventing neglect and for making the

(*g*) Local Government Act, 1888, § 39.

(*h*) § 215; now Local Government Act, 1933, § 136.

borough constables efficient in the discharge of their duties. Promotions in the force are made by it, and it may suspend and also dismiss any constable whom it thinks negligent or unfit, while the justices may suspend but cannot dismiss (*i*). The watch committee may deal with complaints against constables of negligence or misconduct and may fine a constable in a sum not exceeding one week's pay or reduce him to an inferior rank (*j*). It may also award gratuities to constables for meritorious conduct while on duty (*k*).

The watch committee has no control over the action of the police in regard to criminal law and crime, and may not call upon the chief constable to report to it upon any particular case of crime. The relation between the watch committee and a constable in its force is not strictly, if at all, that of master and servant, and it has been laid down that a municipal corporation is not responsible in law for the acts of the police with respect to felonies and misdemeanours (*l*). Therefore when the police had wrongfully arrested a person who brought an action for damages against the corporation of the borough, it was held that the corporation was not liable in damages, the police having acted not as servants of the corporation, but as public servants and officers of the Crown (*m*). It does not follow that the police are in no circumstances the servants of the police authority. That question has not been decided by the courts.

The Act of 1882 (*n*) further requires two borough justices in October of every year to appoint special constables for the borough, who are to act, with all the powers and responsibilities

(*i*) Municipal Corporations Act, 1882, §§ 190–192. These provisions have not been superseded by the Police Regulations (1945 Edition), which seem to provide for dismissals, etc., being in the hands of the chief constable: *Cooper v. Wilson* [1937] 2 K.B. 309; [1937] 2 All E.R. 726; Digest Supp.

(*j*) County and Borough Police Act, 1859, § 26.

(*k*) *Ibid.*, § 24.

(*l*) *Fisher v. Oldham Corporation* [1930] 2 K.B. 364; Digest Supp.

(*m*) Cf. *Lewis v. Cattle* [1938] 2 K.B. 454; [1938] 2 All E.R. 368; Digest Supp.

(*n*) § 196.

enacted by the Special Constables Act, 1831, when so required by a justice's warrant, but not otherwise. In this way special constables are available and ready to be called upon whenever an emergency arises ; under the Act of 1831 their appointment could only be made when trouble had arisen.

In matters relating to the appointment of constables or questions of discipline the watch committee is not required to obtain the approval of the council to its acts and proceedings. This provision is obviously based on motives of general policy. It is not desirable that matters of discipline and general control of the force should be capable of being made the subject of public debate. But questions of finance affecting the whole force are under the control of the council, as are various other questions, of which that relating to police pensions is an instance.

The watch committee is required to send to the Home Secretary a copy of all rules made by it or by the council for the regulation and guidance of the borough constables (o).

Differences between Government of County and Borough Forces.—It will be seen that the legislation above mentioned conferred different powers on borough and county police authorities, the principal distinction being that the members of the borough forces are appointed by the watch committee, which indeed was not even required by statute to appoint a chief constable. Now, however, under the Police Regulations (1945 Edition) (p), the appointment of the chief officer of police (who is spoken of in the Regulations as a chief constable) is subject to the approval of the Home Secretary. In the counties a standing joint committee, a composite body, with the approval of the Home Secretary appoints a chief constable, and he with the approval of the standing joint committee appoints the county constables. In general, the justices have no concern with the general oversight of police forces ; they have one-half representation in the control of county police forces. In the counties the powers of inflicting fines upon constables are vested in the chief constable, who may also

(o) Municipal Corporations Act, 1882, § 192.

(p) Reg. 9.

recommend the payment of gratuities for meritorious conduct (g).

Amalgamation of Police Forces.—During the war the Secretary of State was empowered (r) to make orders amalgamating the police forces in any two or more counties and boroughs maintaining separate police forces. The amalgamations, of which several have taken place in the south of England, were for war-time purposes only and provision is made in the Police Bill now before Parliament for their termination. In the case of forces which will lose their identity under the Bill the amalgamations will, in effect, terminate on the “appointed day,” *i.e.*, 1st April, 1947.

Inspection and Grant.—Attention may now be drawn to legislation affecting both municipal and borough police systems, commencing with the County and Borough Police Act, 1856. By that time it was realised that the discipline and efficiency of the police forces were generally unsatisfactory and must be improved. This was sought to be effected partly by requiring every county to be provided with a police force and also by giving the State assured control over the whole police system of the country. The Act accordingly made compulsory the appointment of police forces for every county, and authorised the Crown to appoint three inspectors to visit and inquire into the state of efficiency of the police for every county and borough. The reports of the inspectors were not intended to be ineffectual, as the Act went on to provide (s) that, upon a certificate of the Home Secretary that the force had been maintained in a state of efficiency in point of numbers and discipline for the year, the Treasury should pay towards the expenses of the police for the year a sum originally fixed at one-quarter of the charge for their pay and clothing. Subsequently the amount of this grant was raised to one-half of

(g) County and Borough Police Act, 1859, §§ 24 and 26; Police Regulations, 1933, r. 9.

(r) Defence (Amalgamation of Police Forces) Regulations, 1942, S. R. & O., 1942, No. 1443.

(s) § 16.

the cost of pay and clothing (*t*), and since 1919 one-half of the total cost of police has been paid (*u*). The statutory provisions, under which the grant-in-aid of the police service was paid, were repealed by the Local Government Act, 1929 (*v*), and grants of one-half the net expenditure on police are paid under the authority of annual supply votes. The grant is only paid on the Home Secretary being satisfied that the force is efficient and that the Police Regulations (*w*) are observed. For this purpose inspection still continues.

Control by the Home Office.—It will have been seen from what has already been stated that the power of the State through the Home Secretary over the police forces, both in boroughs and counties, has been greatly increased from time to time and is now predominant. In the first instance his supervision was from a distance and may be said to have been limited almost to his being entitled to be furnished with certain information and returns. Thus the Municipal Corporations Act, 1835, required that copies of all rules for the regulation and guidance of a borough police force should be sent to the Home Office every quarter (*x*). When county police forces were authorised to be established under the provisions of the County Police Act, 1839, the Home Secretary was required to make rules for the government, pay, clothing and accoutrements of the constables, and now he is empowered to make regulations “as to the government, mutual aid, pay, allowances, pensions, clothing, expenses and conditions of service of the members of all police forces” (*y*).

(*t*) Police (Expenses) Act, 1874; Local Government Act, 1888, § 24.

(*u*) Under the annual supply votes: there was no permanent statutory authority for this last increase.

(*v*) 12th Schd.

(*w*) Made under Police Act, 1919, § 4.

(*x*) Now Municipal Corporations Act, 1882, § 192.

(*y*) Police Act, 1919, § 4. See Police Regulations (1945 Edition). These deal with ranks and designations, strength, appointment, discipline, promotion, hours of duty, etc., pay, allowances, and clothing and equipment, and contain the Police Regulations of August 20, 1920, as amended up to and including March 27, 1945. See also the Police (Women) Regulations (1945 Edition), which contain the Police (Women) Regulations of July 24, 1933, as amended up to and including March 27, 1945.

Later it was found necessary to give the Home Secretary greater powers of control over borough forces and county forces alike. The variety in extent of efficiency in adjoining police areas was at times considerable and a weakly directed force obviously might react injuriously upon the efforts of a more efficient neighbouring force. There was also an insufficiency of numbers in some forces, arising from the desire of police authorities to cut down expenditure unduly. It was realised also that the police forces were becoming increasingly national in their service, and that the State should bear a large part of the cost of police administration because of that national service and of the assumption of greater controlling power. The County and Borough Police Act, 1856, shows in what way these newer conceptions were brought to a practical end. The Home Secretary's power to appoint three inspectors to visit and inspect every police force in the country once a year was accompanied by a condition that, upon the issue of a certificate by the Home Secretary that a police force had during the year been kept in a state of efficiency in point of numbers and discipline, the Treasury would refund one-fourth (*z*) of the expenditure upon the force. It has been the wisdom of the Home Office to appoint as inspectors officers of wide experience and knowledge in police affairs, who have been able not only to criticise defects but to suggest improvements in numerous matters relating to the forces they have inspected, and they have helped to raise the general standard of discipline and efficiency. If more were wanted to stimulate police authorities it would be found in the risk of losing the police grant, if the force were kept or became inefficient. The total cost of police administration in any district is relatively very high, and no police authority could face without great concern the risk of losing so substantial a subvention. It may be added that it is generally admitted that the power of withholding the grant has been reasonably exercised by the Home Office, and on the whole it has materially helped to

create a highly efficient series of police forces throughout the country (a).

Police Grants.—Police grants still remain and have not been merged in the general block grant which has replaced many older specific grants (b), particularly those paid in respect of certain public health services. This retention of distinct police grants is largely due to the different nature of the police service when compared with such matters as public health. The public health services have to a large extent been built up by experiment and exploration on the part of individual health authorities. They have been pioneers, and when their efforts have led to success other health authorities have copied them, and in due time general legislation has followed. Again, some authorities have emphasised one set of health services and spent less on others. In 1929 it was realised that public health authorities had accumulated experience and justified their efforts, so that they might fairly be left to pursue their health policies with less supervision by the Central Department, and only need be judged by the general results as regards the health of the inhabitants of their districts. But the same consideration does not apply to the police forces. Here there is little room for experiment of such a kind as is permissible in regard to public health. Individual action by or on behalf of a single force might lead to the breaking of a chain of effort that can only be effective if all forces work not only to the same end, but by practically the same means.

Metropolitan Police.—The metropolitan police, unlike any other force in the country, is under the direct control of the Home Secretary. It was established in 1829 under the provisions of the Metropolitan Police Act of that year. The metropolitan police district includes the county of London (except the City) and the county of Middlesex and parts of the counties of Surrey, Hertford, Essex and Kent, and the police of that district are authorised also to act in Berkshire and

(a) See also the Police (His Majesty's Inspectors of Constabulary) Act, 1945.

(b) Local Government Act, 1929, §§ 85 and 2nd Schd.

Buckingham. Provision is made in the Police Bill now before Parliament for the rationalisation of the Metropolitan Police and, which at present takes little account of existing local government boundaries.

While the Home Secretary is the police authority for the metropolitan district, the force is placed under a Commissioner of Police and five Assistant Commissioners, appointed by the Crown on the recommendation of the Home Secretary (c). The Commissioner appoints and swears in constables, and, with the approval of the Home Secretary, makes rules and regulations for the government of the force.

The expenses of the force are provided in part by the Treasury, the balance being raised by rate. By the Metropolitan Police Act, 1829, the justices (d) were authorised, with the approbation of the Secretary of State, to issue a warrant to the overseers requiring them to raise as part of the poor rate, a rate not exceeding eightpence in the pound (e) for police expenses and to pay the amount so raised to the Receiver for the Metropolitan Police District, a statutory officer who was made responsible for keeping the accounts and receiving and paying all moneys relating to the metropolitan police force. The Receiver was subsequently (f) constituted a corporation sole with an official seal, and all property of the Receiver for the purpose of his office is to be held in his official name. At the present day the councils into whose areas any part of the metropolitan police district extends pay to the Receiver the proportionate part of the rate due in respect of their areas.

The desirability of subordinating the metropolitan force to the Home Secretary is obvious. The size and importance of London are such that irreparable damage and loss might accrue to the State if the police force in the centre of the Empire became disaffected or unable to control the mob. It was, no doubt, for this reason that, when in 1929 the public health

(c) Power to appoint a fifth Assistant Commissioner was conferred by the Metropolitan Police Act, 1933.

(d) Now the Commissioner.

(e) Altered to elevenpence in the pound (Metropolitan Police Act, 1912, § 1), but limit entirely removed by Police Act, 1919, § 7.

(f) Metropolitan Police (Receiver) Act, 1861.

services were placed under less stringent control by the State, the control exercised by the Home Secretary over the metropolitan force was allowed to remain as complete and far-reaching as ever before.

The City of London Police.—The City of London police force was not established nor is it controlled under the general law relating to police. The force in its present form was established under the powers of the City of London Police Act, 1839, which required the Mayor, Aldermen and Commons of the City in Common Council assembled to appoint, subject to the approval of the Home Secretary, a Commissioner of the City police force, who should appoint such number of police officers as the council should approve, and whose lawful commands the officers appointed should be bound to obey. The Commissioner was authorised, subject to the approval of the council and the Home Secretary, to frame orders and regulations for the general government of the force. In case of special emergency the Home Secretary, with the approval of the Lord Mayor, may authorise constables belonging to the metropolitan police force to act within the City, while the Lord Mayor, at the request of the Home Secretary, in a similar manner may authorise the City force to act within the metropolitan police district.

Until 1919 the City did not receive a State subvention in respect of its police force, nor was it inspected by the Home Office inspectors. Since that date the City has received a grant of one-half of its net expenditure less the product of a four-penny rate and has submitted to inspection. One-fourth of the remaining expenses of the force are paid by the Common Council out of its revenues, and the remainder is raised by rate. In 1907, the parishes in the City, over one hundred in number, were constituted one parish and the police rate was discontinued as a separate rate and became leviable as part of the general rate, instead of being levied in wards as formerly (g).

The accounts relating to the City police are kept by the

(g) City of London (Union of Parishes) Act, 1907.

Chamberlain and submitted to the council yearly. They are also laid before Parliament yearly.

Railway and Canal Police.—Various railway companies and canal companies have obtained by special Acts powers to engage as police constables persons in their employment. These powers are defined in the special Acts and are exercisable only in the area specified by the Act, usually upon the property of the company or in the immediate neighbourhood.

The Police Force.—A police force usually consists of a chief constable, a deputy or assistant chief constable, superintendents, inspectors, sergeants and constables. In the large forces the work is departmentalised, and there are usually criminal investigation departments and departments dealing with the licensing and supervision of hackney carriages. Women are now competent to be appointed police officers.

Every constable in a borough on appointment is sworn in before a justice. Thereupon he has all the powers and privileges and is liable to all the duties and responsibilities of a constable within the borough and in every county within seven miles from the borough, this area being sometimes referred to as his constablewick. He must not only obey the orders of his superior officers, he must also obey all lawful commands from any justice having jurisdiction in the borough or in any county in which he is called upon to act. On dismissal or retirement from the force his powers as a constable immediately cease (*h*).

In the counties constables are sworn before a justice of the county and their powers and duties are exercisable throughout the county and in any adjoining county. They act under the orders of the chief constable, and while in the force may not engage in any other office or employment (*i*). As in the boroughs, a constable on leaving the force, whether by retirement or dismissal, can no longer exercise his powers as a constable and must forthwith deliver over all clothing and

(*h*) Municipal Corporations Act, 1882, § 191 (*5*).

(*i*) County Police Act, 1839, § 10.

accoutrements which have been supplied to him for the execution of his duty.

Constables are debarred from canvassing or otherwise taking part in municipal elections, but they are permitted to exercise any right to vote at such elections, though under earlier police statutes that privilege was denied to them (*j*).

Police Pensions.—On retirement from the force the police are entitled, under the provisions of the consolidating Police Pensions Act, 1921, to receive pensions and allowances, and in certain cases allowances and gratuities are payable to widows and children of deceased constables. Members of police forces are peculiarly liable to receive injuries in the discharge of their duties, especially in times of tumult or riot, and generous allowances may be made to them in respect of injuries so received and to their families in case of their death. The police fund, out of which these pensions are paid, is built up by rateable deductions from the pay of police officers, with additions of certain fines, and any deficiency is charged to the general rate.

The Police and Firemen (War Service) Acts, 1939 and 1944, make provision for the making up of pay and superannuation rights of persons who ceased to serve as police in order to serve in H.M. Forces during the war.

The Police (Appeals) Act, 1927, gave a right of appeal to the Home Secretary by any member of a police force who is dismissed or required to resign as an alternative to dismissal. On receipt of such an appeal the Home Secretary may, if he thinks fit, have an inquiry held, and after considering the report of the person or persons holding the inquiry he may allow or dismiss the appeal or vary the punishment awarded by the disciplinary authority (*jj*).

Duties of Police.—The primary duty of the police is to keep the peace, and as peace officers they are liable to be

(*j*) County Police Act, 1839, § 9; County and Borough Police Act, 1856, § 9; and Police Disabilities Removal Act, 1887, § 2.

(*jj*) See Police (Appeals) Act, 1943 and Police (Appeals) Rules, 1943, S. R. & O., 1943, No. 475 as amended by S. R. & O., 1944, No. 913 for extension of rights of appeal.

prosecuted for failure to discharge this duty (*k*). But they are not left by the law to their own unaided activities in carrying out this duty. A constable has the right to call to his aid the assistance of a private person, who is then bound to obey (*l*). To enable the police to perform their duties the law arms constables with powers of arrest peculiar to themselves and more extensive than those possessed by the individual citizen. The duties of the police to maintain the peace are owed to the public, and in general their performance cannot be made the means of charging the cost to the parties benefited. But though the police are bound to provide adequate protection for life and property, they may nevertheless contract to supply extra protection, beyond that which they consider necessary, on the terms of receiving payment of the cost involved (*m*).

Police Federation.—Shortly after the termination of the Great War, there was an agitation amongst the police with respect to their pay and emoluments, and it was desired by some of them that they might be allowed to form what would be in effect a trade union. It was felt by the Government, for reasons of public policy, that this was not desirable, but at the same time that the force should have a recognised legal channel through which to make representations of any grievances that might arise. Accordingly the Police Act, 1919, was passed, whereby authority was given for the constitution of a Police Federation for the purpose of enabling members of police forces to bring to the notice of police authorities and the Secretary of State matters affecting their welfare and efficiency, other than questions of discipline and promotion affecting individuals. The Federation acts through local and central representative bodies and is independent of and unassociated with any body or person outside the police force. It consists

(*k*) See *R. v. Pinney* (1832) 5 C. & P. 254; 15 Digest 648, 6919; *Charge to the Bristol Grand Jury* (1832) 5 C. & P. 261. Both these cases deal directly with justices and their duty to suppress riots, but constables are expressly mentioned as being under the same duty.

(*l*) *R. v. Brown* (1841) C. & M. 314; 15 Digest 649, 6931.

(*m*) *Glasbrook Bros., Ltd. v. Glamorgan County Council* [1925] A.C. 270; 37 Digest 186, 82.

of officers below the rank of superintendent, and acts through branch boards, central conferences and central committees. Provision is also made for the holding of police councils. On the whole it is considered that the Federation has served a useful purpose. It is of great advantage that the police should have a recognised organisation for making representations respecting their own welfare to the authorities under whom they serve.

The value of the police force as an instrument of local government service has been increasing for many years. It now is, by its variety and efficiency and its adaptability for changing circumstances, amongst the foremost of our services. The rising standard of public requirements, especially in regard to roads and transport, has led to novel duties being imposed on the police. The increased ingenuity of criminals and the ramifications of crime, not only in this country, but throughout the civilised world, have called for more than corresponding ingenuity and skill on the part of the police. The institution of detective departments in the larger forces has been in part the answer to the demand for specialised skill.

The police force throughout the country is treated with respect by the population generally. The members of these forces live amongst the people of the districts in which they serve. The uniform they wear assists them to secure order and obedience. All trace of military organisation is absent from their duties. They are carefully trained and they are looked upon as the friends of the public. It is not remarkable therefore that they are engaged for other services than those which strictly pertain to police duties. Their helpful assistance in the direction and control of street traffic is generally known and appreciated. They are an auxiliary trained force which can readily be called upon in any times of national emergency.

Expenses.—The cost of the maintenance of the police force was formerly paid in boroughs out of the borough rate, and now out of the general rate, and in counties out of the police rate, and later the county rate. The contribution by

the State of one-half of the net expenditure on police has already been alluded to.

Air-Raid Precautions.—Closely related to the police service are the duties which were cast on local authorities before the outbreak of war in 1939 to take measures to protect the civil population from hostile attack from the air. The duty of preparing air-raid precaution schemes was cast primarily upon the councils of counties and county boroughs, but the Home Secretary might provide for schemes being prepared by the councils of non-county boroughs and urban districts. Co-operation and consultation between authorities was required in the preparation of schemes, and schemes might provide for functions being performed by authorities other than those preparing them. Schemes for dealing with fire protection arising from air-raids were also to be prepared by the councils of boroughs and urban districts and might be prepared by rural district councils (*n*). Schemes were to be submitted to the Home Secretary for approval, and when approved became binding on the local authorities concerned (*o*). Grants are paid to local authorities in respect of approved expenditure under a complicated formula designed to increase the percentage of expenditure borne by the grant in proportion to the weighting of the actual population for the purposes of general exchequer grants (*p*).

The first Act dealing with this subject (the Air Raid Precautions Act, 1937), was amended and extended by the Civil Defence Act, 1939. On the outbreak of war, although few schemes had been completed, the scheme-making authorities were required to create and maintain large civil defence organisations. Generally speaking, the decision to place the burden of civil defence upon local authorities was fully justified by events, and the local authorities proved themselves capable of quickly adapting themselves to the new situation and of assuming and carrying out the very heavy burden of

(*n*) Air-Raid Precautions Act, 1937, § 1.

(*o*) *Ibid.*, § 3.

(*p*) Air-Raid Precautions Act, 1937, § 8 and Schd.

civil defence duties which were placed upon them. With the cessation of air attack and the end of hostilities, the civil defence services have been disbanded. The above mentioned Acts have not, however, been repealed in their entirety and provision is made, in the Civil Defence (Suspension of Powers) Act, 1945, for reviving the various powers of the Home Secretary and the Government without the need to pass fresh legislation.

Fire Brigades.—In rural districts powers relating to the extinction of fires might be acquired by the adoption in rural parishes of the Lighting and Watching Act, 1833. In urban districts § 171 of the Public Health Act, 1875, by incorporating provisions of the Town Police Clauses Act, 1847, empowered the local authority to provide fire-extinguishing apparatus with necessary buildings and to employ firemen, and to send their firemen and engines to extinguish fires outside their district.

The Police Act, 1893, § 2, empowered a borough council to delegate the above powers to the watch committee. In such case the watch committee was authorised to employ constables wholly or partially as firemen.

By the Public Health Acts Amendment Act, 1907 (*q*), powers were given to members of police forces and firemen to enter premises in case of fire and to control traffic in the adjoining streets, and by § 90 of the same Act, adjoining local authorities, including a parish council, were authorised to enter into agreements for the common use of fire engines and firemen and for mutual assistance in case of fire.

Fire Brigades Act, 1938.—The attention given before the war to the problem of air-raid precautions also brought to light the unsatisfactory state of the law as to protection from fire, and the Fire Brigades Act, 1938, was accordingly passed. This Act repealed the permissive powers mentioned above (*r*) and placed the compulsory duty of making adequate arrangements for an efficient local fire service upon the council of

(*q*) An adoptive Act.

(*r*) Fire Brigades Act, 1938, §§ 6, 30 and 3rd Schd.

every county borough and county district. This duty could be discharged either by providing a fire brigade, or by agreements with other local authorities or with other persons undertaking to provide, for instance, a volunteer brigade. Moreover, as far as practicable, arrangements were to be made for mutual assistance with other local authorities and persons maintaining fire brigades (s). Lastly, power to charge owners or occupiers of property for services in extinguishing fires was taken away, save that in certain cases the power to charge for attendance at fires outside the district of the authority was to be retained for a period of two years (t).

A Fire Service Commission was set up to supervise the carrying into effect of the Act and to advise the Home Secretary (u). This body had especially to consider the arrangements made by local authorities for mutual assistance in dealing with fires which could not adequately be dealt with by local fire services, and, if in any case it was not satisfied with such arrangements, it might prepare a scheme for co-ordinating fire services, which was to become binding on approval by the Home Secretary (v). It might also recommend that arrangements should be made for one local authority to undertake the provision of a local fire service in the area of another local authority, and the Home Secretary might by order give effect to any such recommendation (w).

The Act contained peculiar default powers. Two years' grace was given to local authorities to provide an efficient local fire service. Thereafter the Home Secretary, if satisfied after holding a local inquiry that such an efficient service had not been provided or was not being maintained, was to be authorised to appoint a "fire service board" which in the first place would have been charged with the duty of preparing an area scheme for approval by the Home Secretary under which adequate fire services would be provided and maintained under the supervision of the board (x). If thereafter a local authority

(s) Fire Brigades Act, 1938, § 1.

(u) *Ibid.*, § 8.

(x) *Ibid.*, §§ 11 and 12.

(v) *Ibid.*, § 9.

(t) *Ibid.*, § 5.

(w) *Ibid.*, § 10.

were to fail to perform its duties under the scheme, the Home Secretary might, after holding a local inquiry, transfer its functions to the fire service board (y).

Various ancillary powers were conferred to as such matters as the erection of fire alarms (z), the provision of fire hydrants (a), entry on premises and the regulation of traffic in cases of fire (b).

In 1941, as a result of experience of air attack, it was decided, as a war emergency, to establish a National Fire Service, the first step being the passing of the Fire Services (Emergency) Act, 1941. The Service was established by the National Fire Service (General) Regulations, 1941 (c), and during the period of emergency the statutory obligations of local authorities under the Act of 1938 were, in general, suspended. Local authorities have, however, been required to pay to the Secretary of State towards the cost of the National Fire Service sums based on the cost of their local fire services during the "standard year" (d).

The local authorities were, however, by no means wholly relieved of their fire fighting duties and were required, in designated areas, to create an organisation which was later known as the Fire Guard Service (e), which had the duty of protecting property against fire, particularly fires caused by air attack. Like the civil defence services, in many cases a large and highly skilled organisation, consisting partly of paid and partly of voluntary personnel, was set up, and performed most valuable services during the periods of air attack.

The Fire Guard Services have, with the end of air attacks, been disbanded, and consideration is now being given to the question whether the National Fire Service should become a permanent institution, whether there should be a reversion to the position under the Fire Brigades Act, 1938, or whether some other arrangement should be made.

(y) Fire Brigades Act, 1938, § 13.

(z) *Ibid.*, § 1.

(a) *Ibid.*, §§ 2, 3 and 4.

(b) *Ibid.*, § 14.

(c) Now the National Fire Service (General) Regulations, 1944, S. R. & O., 1944, No. 1077.

(d) *Ibid.* The "standard year" was the year ending on March 31, 1940.

(e) Defence (Fire Guard) Regulations, 1943.

CHAPTER XXVI

POOR LAW (PUBLIC ASSISTANCE)

History.—The law with respect to the relief of the poor is based on the well-known Act of Elizabeth, the Poor Relief Act, 1601. That statute placed upon the parish the duty of providing for the needs of its own resident poor. Historically, it recognised the parish as a proper unit of local administration and it created a parish organisation through which relief to the poor could be administered. This organisation for over two hundred years was responsible for the care of the destitute poor and was found to be capable of undertaking additional duties which were from time to time entrusted to it, until in process of time the resources of the parish became inadequate to meet the needs of changing times and conditions, and its powers and duties were transferred to other authorities. A step forward was taken when the Poor Law Amendment Act, 1834, authorised the compulsory amalgamation of parishes into poor law unions for the administration of the relief of the poor. In their turn the poor law unions were found to have become unsuited for the discharge of the duties of the poor law administration, and the Local Government Act, 1929, transferred their duties and responsibilities to the larger authorities of to-day, the county councils and the county borough councils.

The Act of Elizabeth.—The Act of 1601 did not, as might have been expected, impose the duty of the care of the poor directly upon the justices. But it should be noted that duties, not unimportant, though to some extent of a supervisory nature, were conferred on them. The justices were already an effective organ in the conduct of parish affairs, and the Act increased their responsibilities. It associated them with the

calling by the churchwardens and others of a meeting of householders of the parish at which overseers of the poor were appointed; their consent was required to the means by which the overseers proposed to carry out their duties; the accounts of the overseers were required to be submitted to them; and certain powers relating to rating and distress were conferred upon them.

The Overseers.—The overseers of the poor were officers newly created by the Act, and they were made directly responsible for the oversight and care of the poor. They were appointed by the householders at the vestry meeting, held annually at Easter, when the accounts of the overseers for the preceding year were submitted and balances in hand were transferred to their successors. The duties of the overseers were defined to be the setting to work of children whose parents could not maintain them, and the setting to work of persons, married or unmarried, without means of maintenance, and the raising, weekly or otherwise, by taxation of a convenient stock of materials to set the poor to work. It will be noted that the Act did not contemplate the giving of relief in money or kind (*a*)—it being apparently assumed that, provided the inhabitants of the parish would pay for the requisite workable materials, there would be no difficulty in enabling the poor, both adults and children, to provide for their own needs by their supervised labour. Any such idea proved ineffective, and it was soon found necessary that direct relief should be afforded to the destitute poor—a necessity that has continued to the present time.

A power to build “places of habitation” for poor impotent people in the waste or common was given by the Act to the churchwardens and overseers conformably to the order of the justices in quarter sessions. The power of rating conferred by the Act of Elizabeth does not call for consideration at this stage, having been dealt with above (*b*).

(*a*) It is not clear when the alternative of granting relief in either money or kind was first introduced.

(*b*) See Chapter VI.

Amending Legislation, 1601 to 1834.—Of amending legislation passed between 1601 and 1834 little need be said, inasmuch as the principles of the Act of Elizabeth were maintained, although the machinery of administration needed and received some measure of amendment in cases in which the parish had become too small for effective administration. By the provisions of Gilbert's Act of 1782 the union of parishes for poor law purposes was authorised, and thus to some extent the Poor Law Amendment Act, 1834, was anticipated; while by the Poor Relief Act, 1819, known as Sturges Bourne's Act, the inhabitants of a parish in vestry assembled were authorised to nominate, and two justices were empowered to appoint, a salaried assistant overseer, whose tenure of office, unlike that of the overseers, was permanent. The assistant overseer's duties in course of time became separated from poor law administration and were centred on the procedure for assessment of rateable hereditaments and collection of rates, until the overseers were abolished and their duties transferred to rating authorities in connection with recent changes effected by legislation (c).

Results of Poor Law Administration.—In the light of subsequent history the administration of the poor law over the long period from 1601 to 1834 is seen to have brought unfortunate results to the country, from the policy of treating the pauper and his dependants simply as a burden on the community, whom it was desirable to assist as little as possible so as to avoid increase of the local rates. From this spirit came the law of settlement which determined the place at which a person, who became chargeable to the poor law, was entitled to be permanently relieved, and the law of removal which enabled a poor law authority to compel a person, who became chargeable, to be removed to his place of settlement. This administration, often harsh and heartless, led to the increasing hatred of the poor law which was entertained by the poor for many generations and is not yet finally eradicated.

Defects of Poor Law before 1834.—It is not remarkable, therefore, that as time passed the poor law and its administration became more and more unsatisfactory. The system proved incapable of meeting the requirements of changing conditions, and the knowledge that the law was applied differently in different areas caused grave discontent among the recipients of relief. On their part the overseers complained that the newer legislation had not effectively stopped the migration of paupers which they insisted was bringing about the breakdown of the poor law. Towards the end of the eighteenth century grave economic conditions arose, and in many parts of the country the justices in quarter sessions intervened by reason of the inability or unwillingness of the overseers to provide for the needs of the starving poor. The justices of Berkshire, meeting at Speenhamland in 1795, sought to meet the situation by fixing a scale of allowances, based on the price of bread, for the relief of the poor, to be given in supplementation of wages so that each family should have at least the equivalent of a labourer's wages. Their example was followed in many parts of the country and in the first quarter of the nineteenth century had disastrous results. It kept down the labourer's wages and greatly increased pauperism. The resulting rise in the poor rates was so serious as to cause grave fears of a financial crisis, and this undoubtedly was a substantial reason for the appointment of a Royal Commission to review the poor law as a whole.

Report of Royal Commission.—The Royal Commission reported in 1834 and made various recommendations which were generally accepted by the Government and led to the passing into law of the Poor Law Amendment Act of the same year. The recommendations of the Commissioners have been summarised as having included three principles of administration: that relief to each class of paupers should be uniform throughout the country, that the situation of the pauper in receipt of relief should be less eligible to him than the situation of the independent labourer of the lowest

class (*d*), and that the inmates of workhouses should be classified in separate buildings according to their needs (*e*).

Poor Law Amendment Act, 1834.—The Poor Law Amendment Act, 1834, provided for the appointment of Poor Law Commissioners, whose duties were later transferred to the Poor Law Board (*f*), and subsequently to the Local Government Board (*g*). Wide powers of control over the administration of poor relief throughout the country were entrusted to the Commissioners, with a view to securing that uniformity which had been recommended in the Report of 1834. Power was given to the Poor Law Commissioners to link up parishes to form a single poor law union and from time to time to dissolve, add to and take from such unions. The Act also provided that an elective board of guardians should administer the laws for the relief of the poor in each union, and it alone should give relief, while the Poor Law Commissioners should lay down rules to be observed in the giving of relief to able-bodied persons and their families.

The powers given by the Act to the Poor Law Commissioners were duly exercised by them, and poor law unions were set up, in which boards of guardians administered the poor law until the 31st of March, 1930.

It is not necessary further to set out the provisions of the Poor Law Amendment Act, 1834, and its legislative amendments, which have been swept away by the Poor Law Act, 1927, now re-enacted by the Poor Law Act, 1930.

Dissolution of Guardians of the Poor.—As in 1834, so in the early years of this century, there was grave complaint

(*d*) The adoption of the principle of less eligibility was due to reaction from the policy embodied in the Speenhamland resolutions. Its promoters hoped that by keeping the position of the pauper appreciably less favourable than that of the lowest class of labourer, as, *e.g.*, by making the total amount of relief to the pauper less than the wage of the labourer, the pauper would have an incentive to try to improve his position. The system soon proved to be impracticable as regards children and hospitals and in course of time has been largely abandoned.

(*e*) S. and B. Webb, *English Poor Law Policy*, p. 11.

(*f*) Poor Law Board Act, 1847.

(*g*) Local Government Board Act, 1871; now the Minister of Health.

of the administration of the poor law. Another Royal Commission reported in 1909, but as there was a Majority Report and a Minority Report of the Commissioners, the latter being more drastic in its recommendations than the former, definite action was delayed. After the taking away, by legislative action, of various powers of the guardians of the poor, the Local Government Act, 1929 (*h*), completed the dissolution of the guardians and the transfer of their powers and duties to the county councils and county borough councils. The Poor Law Act, 1930, consolidated the law, and the Orders made by the Minister of Health under powers conferred on him by that Act have consolidated and brought up to date the numerous Poor Law Orders previously in force (*i*).

Poor Law Act, 1930.—The Poor Law Act, 1930 (*j*), repealing and in substance re-enacting the Poor Law Act, 1927 (*k*), and certain provisions relating to the poor law contained in the Local Government Act, 1929 (*l*), enacts that the law relating to the relief of the poor shall be administered locally by the councils of counties and county boroughs. But the exercise of this duty is to be subject to the extremely wide powers conferred by the Act upon the Minister of Health, who is charged with the direction and control of all matters relating to the administration of the relief of the poor ; except that he may not interfere in any individual case for the purpose of ordering relief. As illustrations of the extensive nature of the powers of the Minister, it is provided that the building, alteration and enlarging of workhouses, the acquisition and disposal of workhouses and their sites, and the preparation of houses for the reception of poor persons, and the dieting, clothing, employment and government of such persons are, along with all other powers of regulating workhouses, government, care

(*h*) § 1.

(*i*) Public Assistance Order, 1930 ; Relief Regulation Order, 1930 ; Public Assistance (Casual Poor) Order, 1931 ; and Relief Regulation (Amendment) Order, 1932. In order to ascertain accurately the legal position of existing officers appointed before 1930 it is sometimes necessary to refer to the pre-1930 laws.

(*j*) § 2.

(*k*) § 2.

(*l*) See Poor Law Act, 1930, 4th Schd.

and employment of poor persons therein and all auxiliary and related powers, to be exercised under the control and subject to the rules, orders and regulations of the Minister (*m*). The incidence of the extensive powers conferred on the Minister of Health over the members and officers of the county councils and county borough councils has already been brought under discussion (*n*).

It remains to consider the law relating to the care of the poor as it stands at present.

Transfer to County and County Borough Councils.—

The transfer of the functions and properties of the poor law authorities to the county councils and county borough councils, effected by the Local Government Act, 1929, was complete. The boards of guardians, established under the provisions of the Poor Law Amendment Act, 1834 (*o*), were dissolved, and thus the principle of the administration of all local government services in one area being committed to the general local government authority received final recognition. In cases in which the areas of dissolved poor law unions did not coincide with the areas of counties and county boroughs, adjustments of areas were directed to be made so as to ensure that the areas of the administration of the poor law should be those of the counties and county boroughs respectively. Similarly, provision was made for the transfer to the county councils and county borough councils of the properties and liabilities and also the officers of the superseded poor law authorities (*p*). That having been provided for, there was committed to the

(*m*) Poor Law Act, 1930, § 1.

(*n*) See above, pp. 341–346.

(*o*) § 1.

(*p*) Where the poor law area was wholly situate within the county or county borough the transfer was made to the council of that county or county borough. In cases in which the area of the poor law authority was not wholly comprised in the area of one county or county borough, the transfer of institutional properties was made to such county or county borough as might be agreed by the counties or county boroughs concerned, or failing agreement as might be determined by order of the Minister: Local Government Act, 1929, § 113; while the officers were transferred (a) with the poor law institution in which they were employed, or (b) with the district in which they were exclusively employed, if situate in one county or county borough, or (c) in other cases as the councils concerned might agree, or failing agreement as might be determined by order of the Minister: *ibid.*, § 119.

councils of counties and county boroughs the administration within their respective areas of the law relating to the relief of the poor. A significant addition, first made applicable to boards of guardians by the Poor Law Amendment Act, 1834 (*q*), prevents a member of any such council from acting by virtue of his office except at a meeting of the council or of its committees or sub-committees. In this way the unauthorised or irregular grant of relief is checked (*r*).

Joint Committees.—Following a common practice in modern legislation in matters affecting local government, the Poor Law Act, 1930 (*s*), empowered the Minister on the application of two or more councils, whether councils of counties or county boroughs, to make an order for combining the areas of those councils for all or any of the purposes connected with the administration of their functions under the Act. If the Minister, though such an application had not been made to him, considered that a combination of areas would tend to diminish expense or would otherwise be of public or local advantage, he might make a similar order. In either case the order might establish a joint committee of the councils as a body corporate with perpetual succession and a common seal. This joint committee procedure is specially suitable for dealing with the casual poor (*t*).

Accounts.—The finances of poor law administration are based on principles now generally familiar in local government. The accounts of a county council and county borough council in respect of public assistance are required to be kept separate from all other accounts and are subject to audit by the district auditor (*u*).

(*q*) § 38.

(*r*) Poor Law Act, 1930, § 16 (2). In its inception this provision was enacted in order to put an end to the abuse caused by reason of a single justice having had the power of ordering relief at any time.

(*s*) § 3, re-enacting § 3 of the Local Government Act, 1929. (*t*) See p. 685.

(*u*) Section 119 of the Poor Law Act, 1930, applies this procedure to county boroughs whose general accounts are not subject to audit by the district auditor; such an enactment was not necessary in the case of a county council, inasmuch as under the Local Government Act, 1888, § 71 (3) (now Local Government Act, 1933, § 219), all the accounts of a county council were already subject to such audit.

State Grants.—There is no special grant from the State to the councils in respect of the relief of the poor, but in fixing the amount of the block grant to the councils under the Local Government Act, 1929 (*v*), expenditure on poor relief is taken into account through the weighting for unemployment.

Expenses.—The expenses of a county council are defrayed out of the county rate, and of a county borough council out of the general rate.

Special items of expenditure which are authorised by the Poor Law Act, 1930, include (1) the expenses of the attendance at conferences on poor law questions of members or the clerk of a county or county borough council, subject, however, to compliance with regulations made by the Minister (*w*); (2) the conveyance of persons chargeable from one place to another, again subject to directions by the Minister; (3) the cost of preparing and collecting information on poor law matters, and (4) the reimbursement to officers of the expenses of restoring damage done to any property belonging to them by an applicant for relief (*x*).

Administrative Schemes.—Under the Local Government Act, 1929 (*y*), each county council and county borough council was required to prepare and submit for the approval of the Minister of Health an administrative scheme setting out the administrative arrangements to be made for discharging the transferred functions, and the provisions of the scheme when so approved became obligatory upon the authority making it. In the case of the poor law the advantage of having a scheme prepared and completed is exceptional.

Policy of Act of 1929.—In passing the Act of 1929 Parliament was animated by feelings more humane and more consonant with the ideas of to-day than were expressed in,

(*v*) See p. 184. Adjustment of the grant is also necessary to take account of the relief granted to public assistance authorities by the reduction of the age at which old age pensions are payable, which was introduced by the Old Age and Widows' Pensions Act, 1940 (§ 16).

(*w*) This power was repealed and re-enacted in a general authorisation by the Local Government Act, 1933, § 267.

(*x*) Poor Law Act, 1930, §§ 113–116.

(*y*) §§ 4 to 8.

and put into force by, the legislation of 1834. It was considered specially desirable that the pauper taint and the use of obsolete terms implying social inferiority should be removed, and that persons, such as poor law children, the blind, deaf and dumb, and the respectable aged poor, who through no fault of their own had been compelled to receive assistance from the poor law, should no longer be treated as members of an inferior class. A significant illustration of this desire is the change in name of the service itself, which is now, in spite of the Short Title of the Poor Law Act, 1930, properly denominated as "public assistance." In many areas the service has now become known as "social welfare" and is administered, not by a Public Assistance Committee, but by a Social Welfare Committee. The same end was sought to be attained in a way which would also remove another defect in administration. The boards of guardians in the course of the discharge of their duties had provided many institutions, such as schools, infirmaries and maternity hospitals, which were used solely for persons needing assistance under the poor law, while many of the local authorities were giving similar services entirely apart from the poor law in their own institutions as part of the public health services administered by them. The Act of 1929 accordingly required county councils and county borough councils, when preparing their administrative schemes, to consider the desirability of securing that, as soon as circumstances might permit, all assistance, which could lawfully be provided otherwise than by way of poor law relief, should be so provided. In this way, for example, the scheme might provide that sick persons needing public assistance should no longer be treated in poor law hospitals but should be transferred to hospitals administered by a county borough council under the Public Health Act, 1875, or by a county council under the Local Government Act, 1888 (2). This alternative power of giving assistance may be applied to many services provided under the Public Health Acts, and Acts relating to mental deficiency, maternity and child welfare, blind persons, tuber-

culosis and education. The result has been that administrative schemes generally have taken large numbers of persons, young and old, out of the jurisdiction of the poor law. In regard to the public services afforded, they and their children are treated as ordinary citizens.

Statutory Committees.—As in the case of other important local services, the local administration of public assistance is committed, under the administrative scheme, to a special statutory committee of the county council or county borough council known as the “public assistance committee” or, sometimes, the “social welfare committee.” This committee is appointed by the council out of its own members (*a*), save that persons who are not members of the council may be added, but in that case some of the added members must be women, and in any case at least two-thirds of the committee must be members of the council. All matters relating to public assistance stand referred to the public assistance committee, and the council may, if its scheme so provides, delegate to the public assistance committee any of its functions under the Poor Law Act, 1930, except the power of raising a rate or borrowing money (*b*). It was therefore open to the council, when settling its scheme, either to delegate full powers to the public assistance committee or to require the acts and proceedings of the committee to be submitted for its approval before becoming effective (*c*).

Guardians Committees.—In county boroughs the public assistance committee is able, by reason of the limited area of the borough, to carry out its duties without further subdivision. The position is different in county areas where populations are often widely scattered. The Poor Law Act, 1930, therefore provides (*d*) that counties shall be divided into

(*a*) Poor Law Act, 1930, § 4.

(*b*) Poor Law Act, 1930, § 4.

(*c*) With a view to promoting as much elasticity as possible in poor law administration, it was provided that any functions of the public assistance committee might, if the scheme so provided, and subject to the general control of that committee, be performed by any other committee of the council: Poor Law Act, 1930, § 4, re-enacting Local Government Act, 1929, § 6.

(*d*) § 5.

areas, each of which shall consist of one or more county districts, and in every such area a "guardians committee" shall be constituted as a local sub-committee of the public assistance committee. In this way it was contemplated that local knowledge of persons claiming relief and of the general conditions in the area could be used. A guardians committee consists of members of the county council and of members of the county district councils representing the area served by the committee, and also added members appointed by the county council to a number not exceeding one-third of the whole. The duties of a guardians committee are limited practically to the investigation of applications for relief and the determination of the nature and amount of relief to be given, and, if so desired by the public assistance committee, the visiting, inspection and management of poor law institutions in the area. These powers can, however, only be exercised subject to such general or special restrictions or conditions as the county council may from time to time impose (*e*).

For the purpose of effectively linking up the county public assistance committee with the guardians committee the statute provides that consultation between the two committees shall be effected in such a manner as the scheme may provide. In addition to that general statement, it is provided that, in particular, the guardians committee shall, in accordance with the scheme, have power to nominate its chairman or other representative to be present at any meeting of the public assistance committee at which business specially relating to the area of the guardians committee is to be transacted. In the proceedings relating to such business the representative so appointed may take part but may not vote (*f*).

In making this experiment in local government two questions appear to have been considered by the Legislature—the need for giving to the county council, through its public assistance committee, general control over the administration of relief throughout the county area (subject, of course, to the Minister's over-riding powers), and the provision of

(*e*) § 5 (3).

(*f*) Poor Law Act, 1930, § 5 (5).

competent bodies in every part of the county so that the case of every applicant may be investigated and determined without delay and on the spot. The solution attempted is a careful balance of the powers and duties of the respective authorities, and time will show whether it proves satisfactory.

Duties of Councils.—While the powers of the Minister over the administration of the relief of the poor are so wide and complete, the councils of counties and county boroughs, who are appointed to administer that relief, have important duties to fulfil. It is impossible for a Central Department to give personal attention to individuals who apply for relief, and this position is recognised by the only limitation which the Act places upon the powers of the Minister (*g*), preventing him from interfering in any individual case for the purpose of ordering relief. Each application has to be considered and dealt with locally. For this purpose the relieving officers report to the members of the public assistance committee or guardians committee (*h*) the circumstances of the applicant, who is required to attend from time to time and answer any questions put to him. The extent of relief to be given, and whether it shall be in money or in kind, is determined by the rota or sub-committee.

Having now noted the authorities which administer public assistance and the control exercised over them by the Minister of Health, we are in a position to consider the principles and practice of the poor law, and incidentally to refer to the duties imposed by statute upon some of the principal officers of the public assistance committees.

Destitution.—The first principle, which has been recognised ever since the passing of the Act of Elizabeth, is that every

(*g*) Poor Law Act, 1930, § 1.

(*h*) Who usually sit in small sub-committees, often called "rotas." The rota system is designed to prevent the same members of the committee meeting and deciding upon the cases of the same applicants for a continuous period. For this purpose an arrangement is effected whereby the members take turns in succession in hearing and deciding upon applications. Some authorities by standing order or regulation preclude any member from hearing and determining applications made by persons resident in the ward or district he represents in the council.

person who is destitute is entitled to immediate relief from public sources, and it is primarily for this purpose that our public assistance organisation exists. What is meant by destitution was expressed by the Legal Adviser of the Local Government Board in his evidence before the Royal Commission on the Poor Laws and the Relief of Distress, 1905-09, in the following terms :

“Destitution when used to describe the condition of a person as a subject for relief, implies that he is for the time being without material resources

- (1) directly available and
- (2) appropriate for satisfying his physical needs—
 - (a) whether actually existing, or
 - (b) likely to arise immediately.

By physical needs in this definition are meant such needs as must be satisfied

- (1) in order to maintain life, or
- (2) in order to obviate, mitigate, or remove causes endangering life or likely to endanger life or impair health or bodily fitness for self support.”

Next it may be pointed out that relief is not given as an absolute right on the part of the recipient. The grant of outdoor relief

“is unlike the obligation to pay insurance benefits or pensions, which is discharged by the payment of a sum of money to which the recipient is legally entitled. The grant of relief rests not on any statutory right of an applicant, but upon the statutory duties imposed upon the local authority by § 15 of the Poor Law Act, 1930, the responsibility for the discharge of those duties being shared by the Minister in virtue of § 1 of that Act” (i).

It therefore follows that a person in receipt of relief may be required to defray the cost of such relief during the preceding twelve months out of any money or security belonging to him (j), and relief given to a person above the age of twenty-one years, for himself and his wife and children under sixteen, may be given by way of loan (k), and, of course, be recoverable. Further, the law places upon the parents, grandparents,

(i) Circular 1236, Ministry of Health (1931).

(j) Poor Law Act, 1930, § 20 (1).

(k) Relief Regulation Order, 1930, Article 15.

husband, wife and children of a destitute person the duty of relieving and maintaining him or her according to their means (*l*), in respect of that duty these relatives being required by the public assistance authority to contribute towards the relief and maintenance of such a person who becomes chargeable to the poor law (*m*), and among the functions which may be assigned to a guardians committee is the determination of the amount to be paid by any recipient of relief or the persons liable for his maintenance towards the amount expended on his relief (*n*).

Relieving Officers.—Bearing in mind that every destitute person is entitled to receive relief, we find that the relieving officers are the effective link between the destitute poor and the members and other officers of the public assistance committee. The area of the authority is mapped out into districts, to each of which a relieving officer is assigned. Applications for relief are made to him and it is his duty forthwith to visit the homes of the applicants and inquire into their circumstances. In cases of sudden and urgent necessity he must at once afford any requisite relief either by giving an order for admission to an institution or by granting relief in kind. He is required to make a report, on what is known as the “case paper,” on every application investigated by him, it being requisite that for every family or person relieved there shall be a full record kept of their or his circumstances. At the next meeting of the guardians committee, or in a county borough of the relief committee or rota for the district, the relieving officer attends with the case paper and reports on the case. The nature and extent of the relief to be granted to the

(*l*) Poor Law Act, 1930, § 14.

(*m*) The word “chargeable” has acquired a special meaning, and implies that the person concerned has become entitled to and has received relief and has thereby become a charge upon the public assistance authority.

(*n*) Poor Law Act, 1930, § 5 (3) (c). But the power to recover maintenance of a poor person depends upon the grant of an order by a court of summary jurisdiction under § 19, and the court fixes the amount. The court is not bound by any decision as to amount made by the guardians committee. The amount thus fixed by an order may be recovered as a civil debt in a court of summary jurisdiction: *London County Council v. Betts* [1936] 1 K.B. 430; [1936] 1 All E.R. 144; Digest Supp

applicant is thereupon fixed by the committee. If indoor relief in an institution is granted, it is the duty of the relieving officer to give the applicant an order for admission to an institution ; if outdoor relief in the applicant's home is granted, it is the duty of the relieving officer to ensure that it is afforded to the extent ordered by the committee.

Outdoor Relief.—Outdoor relief is administered in accordance with the regulations contained in the Relief Regulation Order, 1930, as amended by the Relief Regulation (Amendment) Order, 1932. It is a common feature of these Orders, and of the Public Assistance Order, 1930, that the responsibility for complying with their requirements is placed upon the councils to whom the duty of discharging poor law functions has been assigned—that is, the county councils and county borough councils. In some instances the Orders place obligations upon the council or public assistance committee, and it is explained in the Order that in such case the obligation rests upon the council unless it is included in the functions delegated to the public assistance committee by an administrative scheme. In most cases the duties have been assigned to the public assistance committee in the council's administrative scheme, but it is intended to be made clear that the regulations must be enforced by, and on the responsibility of, the council except to the extent to which they have been delegated in the administrative scheme. This explanation should make it clear why so many duties are laid upon the council in these Orders.

Relief in Kind.—Under the Relief Regulation Order of 1930 (o) one-half at least of the outdoor relief allowed to any able-bodied man was required to be allowed in kind, *i.e.*, in food, etc., for which orders are usually given to local tradesmen. It has long been the opinion of the Ministry and its predecessors that the practice of granting relief in kind is of great value, though the relative advantages and disadvantages of granting relief in money or in kind have been keenly debated for many years. In December, 1931, the Minister, on representations made to him by the Associations of County Councils

and Municipal Corporations, rescinded the requirement that relief to an able-bodied man must to the extent of one-half at least be in kind, leaving the determination of that question to the discretion of the local authorities. At the same time he pointed out (*p*) that relief to be effective must ultimately take the form of articles of necessity such as are meant by the expression "relief in kind."

Other forms of outdoor relief are provided to meet other needs of the destitute poor, such as those that arise on account of sickness or the death of a member of the family. In the latter case the funeral expenses may be paid by the council—of course through the public assistance committee. In cases of sickness or accident the relieving officer sends the patient to the district medical officer, an officer of the committee, by whom the necessary medical attendance is given, and who is required to furnish to the committee and the relieving officer records and particulars which are specified in the Orders of the Minister.

Able-bodied Persons.—The case of the able-bodied person should be mentioned. The policy of 1834 was to discourage the giving of outdoor relief to able-bodied persons (*q*), who presumably ought to be able to provide for their own needs, and the Commissioners under the Poor Law Amendment Act, 1834, were authorised (*r*) to make regulations with respect to the relief to be given to such persons or their families, the guardians being entitled to modify the regulations in cases of emergency. The relative existing statutory provision is contained in the Poor Law Act, 1930 (*s*), which empowers the Minister by Order to regulate the administration of outdoor relief to able-bodied men or their families, and to declare on what conditions such relief may be afforded. It will be seen that the change of wording enables able-bodied women to be relieved unconditionally. The conditions upon which an able-bodied man may be relieved are stated in the Relief Regulation Order, 1930, and provide that such a person

(*p*) Circular 1236 (1931).

(*r*) § 52.

(*q*) This was not confined to male persons.

(*s*) § 45.

may not receive relief in respect of any period during which he is employed at wages, but that relief may be given him without conditions in cases of sickness, accident or infirmity affecting himself or any members of his family, or the burial of a member of his family.

Relief may not be given for payment of rent, for establishing a poor person in business, for redeeming pawned articles, or for purchasing tools or other articles not included in the expression "relief in kind" (t).

The institution of the Unemployment Assistance Board by the Unemployment Act, 1934, has resulted in removing a large part of the unemployed from the care of the public assistance authorities. That Act provides for the granting of allowances by the Board to unemployed persons between the ages of sixteen and sixty-five who have been, or who, had they ever had work, might have been expected to have been normally employed in insurable employment under the Widows', Orphans' and Old Age Contributory Pensions Acts, 1925 to 1932. The Act further prohibits a public assistance authority from granting outdoor relief to persons entitled to allowances under the Act (u).

Institutional Relief.—It will be appreciated that reception into institutions is requisite in cases of many classes of the poor—the sick, the aged and infirm, and those suffering from mental and physical disabilities, as well as mothers and children. This fact calls for the separation of different classes from each other, and this should as far as practicable be done by the provision of separate buildings for various classes of inmates. A hospital for the sick and aged and infirm was usually provided by the boards of guardians, but these hospitals may now, under the provisions of the Local Government Act, 1929, be used as general hospitals, though they are still available for the sick poor, who need no longer be treated there as though they were members of a pauper class.

(t) Relief Regulation Order, 1930, Articles 12 and 13.

(u) Unemployment Act, 1934, § 53 and 8th Schd.

A poor law institution, with which indoor or institutional relief is associated, is defined in the Public Assistance Order, 1930, as an establishment provided for the reception and maintenance of the poor other than a hospital, a children's home and a separate casual ward, and was formerly known as a workhouse. Subject to the supreme control of the Minister, a management committee, which may be the council or the public assistance committee or a guardians committee acting at the request of the public assistance committee (*v*), is responsible for the guidance, government and control of the institution and its officers and inmates, and its members may visit the institution at any time at reasonable hours (*w*). The management committee appoints a sub-committee called a house committee (*x*), which takes detailed charge of the institution, inspecting it at least fortnightly, and examines stores, considers reports of officers and complaints of inmates, interviews inmates recently admitted and reports its proceedings and recommendations to the management committee (*y*). The principal officer of the institution is the master.

Officers of Institutions.—Indoor or institutional relief takes many forms according to the needs of the recipient. The master (or in the case of a separately administered hospital, the medical superintendent) of the institution admits applicants, either on an order of the committee or of the relieving officer, or on his own authority without an order in case of sudden or urgent necessity, or on transfer from another institution, or under an order of removal. He is responsible for the general control and management of the institution, for its discipline, and for the observance of the dietary regulations framed by the council after receiving the advice of the medical officer of the institution. The master keeps full records of the

(*v*) Article 11.

(*w*) Article 67. By the Poor Law (Amendment) Act, 1938, § 1, local authorities may grant a personal allowance not exceeding two shillings per week to any person aged 65 years or upwards in receipt of relief from them in a workhouse or other poor law institution.

(*x*) Article 11.

(*y*) Article 72. Under the Public Assistance (Amendment) Order, 1940, inspections at present need only take place once a month.

patients, their classification and their circumstances and reports thereon to the house committee of the institution. Inmates wishing to leave the institution must give reasonable notice to the master of their wish to do so. An inmate, who has, in the opinion of the council, discharged himself frequently without sufficient reason, may be detained for a period not exceeding one hundred and sixty-eight hours (z).

The medical officer of the institution is required to examine every inmate as soon as practicable after admission and enter into the appropriate book a record of his physical and mental condition, and so long as the inmate remains in the institution he is under the constant care, according to his need, of the medical officer.

Casual Poor.—The casual poor, formerly known by the less pleasing name of vagrants, have always been a problem in poor law administration. They will not work nor will they accept any responsibility in life. They drift about from place to place, occasionally obtaining employment, but generally they are only concerned to make their way to some institution where they may obtain food and shelter. The co-ordination of effort to supervise the casual poor is undertaken by joint committees (a), experience having shown that in this way the problem can most effectively be met, and many Orders for the constitution of these committees have been made by the Minister. This, however, does not relieve the poor law authorities of all responsibility, for the Poor Law Act, 1930 (b), requires the council of every county and county borough to provide within its area such casual wards and furnishings as the Minister considers necessary. Casual poor persons are to be admitted to such wards, dieted, set to work and discharged in accordance with regulations prescribed by the Minister, but a casual poor person may not discharge himself

(z) Poor Law Act, 1930, § 33. Subject to the provisions of any statute an inmate may not be detained in an institution against his will. He may therefore leave the institution on giving reasonable notice to the master, and thereby is said to have discharged himself.

(a) See p. 673.

(b) § 41.

from a casual ward before nine in the morning of the second day following his admission nor before he has performed certain tasks (c).

Children under the Poor Law.—The care of children has become an important factor in poor law administration, and is much more humanely provided for than used to be the case. The desire to prevent children from starting life with the stigma of pauperism has been given expression, as already mentioned, in the relative sections of the Local Government Act, 1929. Parents whose young children are inmates of an institution have the right of access to their children daily, unless the medical officer otherwise directs.

Children other than infants may not be retained in an institution except in cases of sickness. If not then taken away they may be transferred to children's homes, forming part of the institution, or they may be boarded out.

Children in Institutions.—The management committee and the house committee have responsibilities, as prescribed by the council, in respect of children's homes (d), which are separate from the general institution. The superintendent of the children's home admits children upon an order signed by the clerk, or a relieving officer, or the medical officer in charge of another establishment, subject to the medical officer having certified in writing that the child is free from any infectious or contagious disease. Dietaries are prescribed and it is satisfactory to note that each child is fed according to appetite. Children capable of working are to be trained in some branch of industry or in household or in other useful work suitable to their age and sex. The superintendent keeps a health record of each child and he may not punish a child for misbehaviour except in accordance with strict regulations, and various kinds of punishment, such as confinement in a dark room, are forbidden.

(c) Poor Law Act, 1930, § 44.

(d) Public Assistance Order, Article 77.

Boarded-out Children.—Other children are boarded out, but they must be orphan or deserted children or children in respect of whom parental rights are vested in the local authority under § 52 of the Poor Law Act, 1930 (*e*). All duties in respect of boarded-out children are exercised under the control and direction of a boarding-out committee. Strict supervision is exercised over the foster parents with whom children are boarded out and over their homes.

Apprenticeship of Children.—Provision is also made for the apprenticing of children. This is one of the duties in respect to children that dates back to the Act of Elizabeth. The hardships to children that used to accompany apprenticeship have of course been abolished, and every care is taken to ensure that children who are apprentices are effectually taught the trade to which they are apprenticed and are brought up in healthy surroundings. The decay of apprenticeship in general has made this class of training less readily practicable.

Law of Settlement.—The scope and methods of obtaining relief have been considered ; it remains to consider where that relief is to be demanded.

The assignment to the parish of the duty of providing for the needs of its poor inevitably led to the law of settlement and removal. Each parish was naturally interested in keeping down its own poor rates, and thus was anxious to prevent the growth of a potential liability by the immigration within its boundaries of persons who might later become chargeable. Powers to enable each parish thus to protect itself were given by the Poor Relief Act, 1662, a statute which has been criticised as inhumanly conceived and inhumanly administered (*f*). It recited that

(*e*) This section gives power to the council of a county or county borough by whom a child is maintained to resolve that all parental rights and powers shall vest in the council until the child reaches the age of eighteen years, if the child has been deserted by the parent or otherwise the parent is unable or unfit to discharge his or her parental duties.

(*f*) See, *e.g.*, G. M. Trevelyan, *Blenheim*, p. 19.

“poor persons are not restrained from going from one parish to another, and therefore do endeavour to settle themselves in those parishes where there is the best stock, the largest commons or wastes to build cottages, and the most woods for them to burn and destroy ; and when they have consumed it, then to another parish, and at last become rogues and vagabonds, to the great discouragement of parishes to provide stocks, where it is liable to be devoured by strangers.”

The Act accordingly authorised two justices of the peace, upon complaint of the churchwardens or overseers, to issue a warrant for the removal of any person within forty days after his coming to settle in a parish in a tenement under the yearly value of ten pounds. The person removed was to be conveyed to the parish where he was last legally settled, “either as a native householder, sojourner, apprentice, or servant, for the space of forty days.” An appeal was given to quarter sessions, which often resulted in lengthy and costly litigation between parishes.

It will be seen that the Act of 1662 dealt with three distinct matters. First, it provided for removal. This was not limited in its operation to persons who had actually become chargeable ; it authorised, on the contrary, the removal of a person who had not yet shown any signs of destitution. But, secondly, the power to remove implied some rule as to the place to which removal was to be ordered ; and thus the Act began the lengthy process of developing the law of settlement, that is the law prescribing the place in which a person is entitled to be relieved. A great deal of litigation and much legislation throughout the eighteenth and nineteenth centuries went to the definition of settlement, and its details cannot be pursued here. Thirdly, the Act of 1662 indirectly introduced a third topic. Persons occupying a tenement of the yearly value of ten pounds or more could not be removed although they were not legally settled in the parish. Hence arose the status of irremovability, which also has been the subject of much later legislation.

This prohibition of movement to the poor resulting from

the law of settlement and removal was not only hard to them; it took away from them the incentive to effort for improving their conditions and created a permanent body of poor, generation succeeding generation, which became a continual burden on the community. The position was pithily expressed by Bentham (g) :

“ There is no employment for me in my own parish ; there is abundance in the next. Yet if I offer to go there I am driven away. Why ? Because I *might* become unable to work one of these days, and so I must not work while I am able. I am thrown upon one parish now, for fear I should fall upon another, forty or fifty years hence. At this rate how is work ever to be done ? If a man is not poor he won't work ; and if he is poor the laws won't let him.”

Some mitigation of the severity of the law was obtained by the passing of the Poor Removal Act, 1795. This Act limited the operation of a removal order to a person actually becoming chargeable to the parish in which he was residing, but in which he had acquired no settlement.

Present Law of Settlement and Removal.—In the first place it is the duty of public assistance authorities to relieve all destitute persons in their areas, subject, however, to orders of removal (h). Therefore a person unable to support himself must be relieved, first, where he actually is, and, secondly, by the place to which he is removable. This is reinforced by the provision that the authority of his settlement is liable for the cost of relief except in the case of a person who is irremovable (i). Thirdly, however, no removal order is to be made in the case of a person becoming chargeable by reason of sickness or accident unless it will produce permanent disability (j). Hence the place where a person is to be permanently relieved is his county or county borough of settlement, or, if he is irremovable, the place where he is resident when he becomes chargeable. It will be convenient to com-

(g) *Truth v. Ashurst, Works*, Vol. V, p. 234.

(h) *Poor Law Act*, 1930, § 15.

(j) *Ibid.*, § 95.

(i) *Ibid.*, § 105.

mence by considering irremovability, for if a person is irremovable his legal settlement does not arise for consideration. Irremovability is acquired by one year's residence in a county or county borough. However, it is not every form of residence which counts for this purpose; for instance, residence while in receipt of poor relief, or while in some form of institution, or while serving in the armed forces, is excluded. But such excluded periods do not prevent qualifying residence before they occur being added to qualifying residence after they cease, in order to make up the necessary year. Some other persons are also irremovable; for instance, a child under sixteen residing with a parent who cannot lawfully be removed (*k*).

Settlement.—A settlement may be acquired in a number of ways, which may conveniently be tabulated :

1. *Birth.*—*Prima facie* a person is settled in the county or county borough in which he was born until it is shown that he has derived or acquired a settlement elsewhere (*l*).

2. *Derivative settlement.*—By way of exception to the fundamental presumption of settlement in the place of birth, a person may derive a settlement from some other person. This occurs in two cases :

- (a) A child up to the age of sixteen has, if legitimate, the same settlement as his father, or, if illegitimate, of his mother, and retains this settlement after attaining sixteen until he acquires a new one.
- (b) A married woman has the same settlement as her husband, which continues after the ending of the marriage; but if deserted she may acquire a new settlement by residence (*m*).

3. *Acquired settlement.*—A person may in a variety of ways acquire a new settlement by his own act. These are :

- (a) *Residence* in a county or county borough for three years; but the residence must be such that in each year a

(*k*) Poor Law Act, 1930, § 93.

(*m*) *Ibid.*, §§ 85 and 86.

(*l*) *Ibid.*, § 84.

status of irremovability would have been acquired thereby. This obviously excludes residence while in various institutions or while in receipt of poor relief. But a further point must be noted. To acquire a status of irremovability, it is enough that one year's qualifying residence should have occurred, and periods broken by residence of a type, which is excluded from the computation, can be added together to make the necessary year. But in the case of a settlement by residence, the period of three years must be continuous, so that should any of the excluded periods occur, the three years' residence must start to be computed again after their determination, and broken periods of qualifying residence cannot be added together (*n*).

- (b) *Apprenticeship*.—A settlement may be acquired by forty days' residence in a county or county borough in pursuance of a duly stamped apprenticeship contract (*o*).
- (c) *Estate*.—Residence for forty days in a county or county borough in which a man has an estate in land, freehold or leasehold, confers a settlement therein. But this settlement determines if he ceases to reside within ten miles of the county or county borough. The estate may be of any value, provided only that, if purchased, it must have cost at least thirty pounds (*p*).
- (d) *Renting*.—Residence for forty days in a county or county borough in which a person rents and occupies for one year a tenement at a rent of not less than ten pounds confers a settlement if he pays the rent and rates in respect thereof for one year (*q*).
- (e) *Rating*.—Residence for forty days in a county or county borough in which a person pays rates and taxes in respect of a tenement of the yearly value of ten pounds, being either his property, or rented and occupied by him for a year (*r*).

(*n*) Poor Law Act, 1930, § 86. *Dorchester Union v. Weymouth Union* (1885) 16 Q.B.D. 31; 37 Digest 253, 489; *St. Olave's Union v. Canterbury Union* [1897] 1 Q.B. 682; 37 Digest 253, 487.

(*o*) *Ibid.*, § 87. (*p*) *Ibid.*, § 88. (*q*) *Ibid.*, § 89. (*r*) *Ibid.*, § 90.

Removal.—Persons who become chargeable in a county or county borough, other than that in which they have a settlement, may, unless they have acquired a status of irremovability, be removed to their county or county borough of settlement. There is no power to order removal until the person becomes actually chargeable.

This order may be obtained from two justices upon their being satisfied that a person has become chargeable to the authority making complaint without being settled in or irremovable from the district of that authority. The order is served on the council alleged to be liable, by whom appeal may be made to quarter sessions. Removal orders may be suspended in case of the sickness or other infirmity of, or risk of danger to, the person ordered to be removed. Removal may be effected without an order by consent of the two authorities concerned. In actual practice a person chargeable is often left in an institution not belonging to the county or county borough responsible for his maintenance, the cost of his maintenance being defrayed by that authority. In a recent case (*s*) it has been decided that the provisions of the Poor Law Act, 1930, as to removal exclusively govern the matter, and the earlier law has ceased to be of effect.

(*s*) *Glamorgan County Council v. Birmingham Corporation* [1933] 1 K.B. 198; Digest Supp.

CHAPTER XXVII

EDUCATION

History.—The story of elementary education in England may be divided into two periods—that which preceded and that which followed the legislation of 1870 (*a*). The step taken by Parliament in passing the Education Act of that year was a landmark in English education in that it expressed a determination that every child should be afforded an opportunity of being taught—or rather should be put under obligation to be taught—the rudiments at least of an elementary education. Since that decisive time the views and requirements of the Legislature have been extended in many directions. It was realised that every child, whatever the status and means of his parents, was entitled to have the best educational facilities that his abilities could profitably make use of, and therefore that in proper cases children should be enabled to continue their studies by means of scholarships and other forms of assistance; that children suffering from defects, whether physical or mental, should, so far as they were educable, be taught and fitted for some useful position in life; that, inasmuch as capacity for education was lessened if the child was not well fed or nourished or was suffering from ill health, it was essential that wholesome food should be supplied at public cost if the parent could not provide it; that a school medical service should be provided; and that comradeship should be cultivated and the right use of leisure taught, so that youth might be trained to acquire physical and mental qualities that would prepare the way for intelligent and loyal citizenship in adult life. So far as regards the children of the people.

(*a*) And, incidentally, ended with the coming into operation of Part II of the Education Act, 1944, on April 1, 1945.

It was further realised that agencies providing higher standards of education should be co-ordinated and brought into living association with the work of elementary education. Provision was made for all these benefits to be provided by authorities acting through special committees whose members in process of time acquired experience and skill in matters relating to education, and whose activities were supervised and to a large extent controlled by a Government Department specially created and charged with such duties. Add to this that the expenses of this costly scheme of education were divided between the local rates and grants in aid from the State. This in short is the story of the system of education, which after many statutory changes became embodied in the Education Act, 1921.

Experience gained during the period between the wars, together with the effects of the war just ended, and not least the experiences of evacuation, brought about as a result the first large-scale step towards post-war reconstruction, the creation by the Education Act, 1944, of what it is hoped will become a single national educational system. The former Board of Education is replaced by a Minister of Education expressly charged with the duties of promoting "the education of the people of England and Wales and the progressive development of institutions devoted to that purpose," and of securing "the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive educational service in every area" (b). Provision is or is to be made for the reform of local administration and the transfer of all educational functions of local authorities to the county and county borough councils (c), for a single statutory system of public education organised in three progressive stages (primary, secondary and further education) (d), for the bringing of all schools up to prescribed standards and the provision of new schools where necessary (including boarding schools) in accordance with an ordered

plan (*e*), for the re-classification of non-provided schools in three classes of "voluntary schools (*f*), for collective worship and religious education (*g*), for the education of pupils requiring special educational treatment (*h*), for the progressive raising of the school-leaving age to sixteen (*i*), for new and wide facilities for further education, including compulsory part-time attendance up to the age of eighteen (*j*), for free medical inspection and treatment for all pupils (*k*), for milk and meals for all pupils (*l*), for recreation and social and physical training (*m*), for the abolition of fees at secondary schools (*n*), for the training of teachers (*o*), for the registration and inspection of independent schools and the closure of unsatisfactory schools (*p*), and for assistance by means of scholarships and otherwise (*q*), and of grants to universities and university colleges (*r*).

The Minister is given extensive powers of enforcing the duties of local education authorities (*s*) and provision is also made for the payment of increased grants towards the cost of bringing the Act into effect (*t*).

It will be some time before all the provisions of the Act can come fully into effect, but it can be said without doubt that when implemented the Act will constitute no less a landmark in the history of the educational system of England and Wales than did the Act of 1870.

If, by way of contrast, we look back to the state of elementary education at the beginning of the nineteenth century, we find that the subject was almost totally neglected. The Legislature did not recognise any duty to provide facilities for the education of the children of the workers. Many children were employed for several hours daily in arduous occupations and would not have had either time or physical capacity for receiving instruction, even if schools had been available. Happily, as has so often happened in regard to public services eventually taken over by the State, the initiation of a public system of elementary education was undertaken by voluntary agencies

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| (<i>e</i>) §§ 9-14. | (<i>f</i>) § 15. | (<i>g</i>) §§ 25-30. | (<i>h</i>) §§ 33 and 34. |
| (<i>i</i>) § 35. | (<i>j</i>) §§ 41-47. | (<i>k</i>) § 48. | (<i>l</i>) § 49. |
| (<i>m</i>) § 53. | (<i>n</i>) § 61. | (<i>o</i>) § 62. | (<i>p</i>) §§ 70-75. |
| (<i>q</i>) § 81. | (<i>r</i>) § 84. | (<i>s</i>) §§ 68 and 99. | (<i>t</i>) §§ 100-106. |

inspired by social and religious reformers, who established two societies for the promotion of education amongst the poor, the one desiring that the religious teaching in the schools should be undenominational, the other seeking to teach the principles of the Church of England. These societies raised subscriptions for the erection and maintenance of schools. Much good work was done, but the financial assistance given by the public to the societies was inadequate for the provision of a national scheme of education. Realising the need for the extension of school facilities, Parliament, not being prepared to take direct control of the means of providing education, made grants to the two societies, the payments commencing with the year 1833. It was made a condition of the grant that one-half of the total estimated expenditure should be raised by private contributors. From time to time the parliamentary grants were increased, and the supervision of their administration was referred to the Privy Council. This led eventually to the appointment of inspectors of schools by the Committee of the Privy Council, the forerunner of the Board of Education. The control exercised by the State was extended by a later provision that grants might be given towards the salaries of teachers in the schools, when the school buildings and the character of teaching given were satisfactory to the school inspectors, while it was sought to train future teachers by enabling pupil teachers to give assistance in the schools. To facilitate the provision of sites for new schools, various School Sites Acts were passed, the first in 1841. These developments, inadequate as they were, and largely because they were inadequate, led to a demand for a national scheme of education, and the recognition that elementary education was a matter of national responsibility. The issue, which was keenly fought and decided in 1870, was whether legislation should be based on an extension of the voluntary system, or should place education under the direct control of the State. In the end the latter policy prevailed, but, in accordance with our national characteristics, a compromise was reached, and the status of voluntary schools was preserved.

Elementary Education Act, 1870.—The Elementary Education Act, 1870, thus was passed to secure the provision of elementary education for all children. For this purpose the whole of the country was divided into school districts consisting of (a) municipal boroughs and (b) parishes (not being in boroughs) in which a separate poor rate was or could be made. In every school district sufficient accommodation in public elementary schools was to be made available for all the children resident therein for whose elementary education efficient and suitable provision was not otherwise made. As it was a fact that in all the large boroughs and in many other school districts no such efficient and suitable provision had been made, it was enacted that in each such district the duty of making good the deficiency should be entrusted to a new *ad hoc* authority, known as a school board, to be elected by the ratepayers of the district. The school board was empowered to acquire land and build schools and, by engaging the services of teachers and in other ways, to foster the provision of elementary education. In school districts in which adequate accommodation and provision for elementary education were already being afforded by voluntary schools, school boards were not needed, all that was necessary being that care should be taken that the accommodation available was being used, and to ensure this it was enacted in 1876 that in such districts school attendance committees should be appointed (*u*). These requirements recognised two important principles—that the provision of elementary education had become a question of national obligation, and that the policy of the Act was to supplement and not to supersede the provision already made. The latter principle has had important consequences in the subsequent history of education.

Provided and Non-provided Schools.—Since 1870 (and until 1945) there have been in existence two classes of elementary schools, the one class consisting of schools wholly provided and governed by the school boards and their successors, and

(*u*) Elementary Education Act, 1876, § 7.

known as "provided schools," and the other class comprising schools erected by voluntary effort and to some extent (*v*) still controlled by managers representing the views, chiefly religious, of those who provided the funds for their erection. The latter class were known and described in the statutes as "non-provided schools" (*w*). The distinction will be further noted later in this chapter.

Cumulative Vote at Elections.—The practice of entrusting new duties to *ad hoc* authorities was in 1870 still generally approved, but is not now in favour; nor is the cumulative vote, which was adopted in the case of school board elections, now exercised (*x*). This procedure of the cumulative vote has not been followed in any later elective system and since the coming into operation of the Education Act, 1902, has ceased to exist.

Conscience Clause.—Acute controversy on the teaching of religion in schools, whether voluntary or provided by the school boards, led to the introduction into the Act of 1870 of a "conscience clause," which entitled a parent to withdraw his child from school while religious education was being given (*y*), and a further provision that no denominational religion should be taught in a provided school (*z*). Again, it was laid down that the parliamentary grant-in-aid should not be made in respect of any instruction in religious subjects (*a*). These provisions (except the last) are still in force, and have recently been extended (*b*), though they have also been adapted to the new system of county and voluntary schools (which replace the provided and non-provided schools). If parents desired their

(*v*) Even under the Education Act, 1944; see § 15.

(*w*) Under the Education Act, 1944, such schools are called voluntary schools, though they may be any one of three classes, viz. controlled schools, aided schools or special agreement schools.

(*x*) Under the principle of the cumulative vote each elector has as many votes as there are vacancies, and he may give all his votes to one candidate or divide them between more candidates than one in whatever way he likes.

(*y*) Elementary Education Act, 1870, § 7 (1).

(*z*) *Ibid.*, § 14 (2).

(*a*) *Ibid.*, § 97 (1).

(*b*) Education Act, 1921, §§ 27 (1) (a), 28 and 6th Schd., para. 3 (a) (now replaced and varied by the Education Act, 1944, §§ 25-30).

child to receive religious instruction of a kind not given in that school and the child could not reasonably attend a school where it was given, the child might be withdrawn to receive such instruction elsewhere (c). Again, if parents desired a child attending a non-provided school to receive religious instruction such as was given in provided schools and the child could not reasonably attend such a school, then such instruction was to be given to the child in the non-provided school (d).

In effect, the teaching of religion in already existing schools was left in the hands of those who owned the schools. In the case of schools provided by the school boards the teaching of the religion of the Bible was encouraged so long as the special denominational tenets of any particular Church are not taught (e).

Under the Education Act, 1944, the terms "provided" and "non-provided" schools, all of which were elementary schools, cease to exist. All primary and secondary schools are now divided into county schools (established and maintained by the local education authority) and voluntary schools (not so established) (f). Voluntary schools are of three classes: controlled schools, aided schools and special agreement schools (g). In the first place, the Act makes it obligatory for the school day to begin, in both county and voluntary schools, with collective worship on the part of all pupils, unless the premises make this impracticable (h). No pupil is to be required to attend or to abstain from attending any Sunday school or place of religious worship, and the parent of a pupil attending a county or voluntary school may withdraw him from attendance at religious worship in the school, or from religious instruction (i). If the parent of such a pupil wishes him to receive religious instruction of a kind not provided in the school, he may, subject to conditions, be withdrawn for that purpose (j). The

(c) Education Act, 1936, § 13.

(d) *Ibid.*, § 12.

(e) Education Act, 1921, § 28.

(f) Education Act, 1944, § 9.

(g) *Ibid.*, § 15. The class into which a school will fall depends upon the ability of the managers or governors to bring the school up to the prescribed standard and to keep in repair the fabric of the school.

(h) *Ibid.*, § 25 (1).

(i) *Ibid.*, § 25 (3), (4).

(j) *Ibid.*, § 25 (5).

religious worship in a county school is not to have a denominational flavour and normally the religious instruction given in such a school is to be undenominational and in accordance with an agreed syllabus (*k*). In special circumstances, however, facilities may be given in a county secondary school for the provision of denominational instruction in accordance with the parents' wishes, provided no cost falls upon the authority (*k*). In controlled schools religious instruction will normally be given in accordance with an agreed syllabus but, if the parents of any pupils desire religious instruction of the type formerly given at the school, arrangements may be made for such instruction to be given for not more than two periods per week (*l*). In the case of aided and special agreement schools the religious instruction is to be under the control of the managers or governors and to be in accordance with the provisions of the trust deed or previous practice. But if parents of any pupils desire them to be instructed according to an agreed syllabus and cannot reasonably send them to a school where that instruction is provided, arrangements are to be made to provide it in the school, either by the managers or governors or, if they are unwilling, by the authority (*m*).

Expenditure of School Boards.—The expenditure incurred by school boards was defrayed out of a school fund, provided partly by school fees (*n*) paid by the parents of scholars, partly out of the local rate and partly out of a parliamentary grant. This grant was only paid upon the fulfilment by the school board of certain conditions contained in the minutes of the Education Department in force for the time being. The school board, which was constituted a body corporate, with perpetual succession and a common seal, had no power to levy a rate, but any deficiency in the school fund was made the subject of a precept served upon the rating authority of the school district, namely, the council in the case of a borough and payable out of the borough fund or rate, and

(*k*) §§ 26, 29 and Schd. v.

(*l*) § 27.

(*m*) § 28.

(*n*) School fees might be remitted in case of parents' admitted poverty.

in other districts (except the Metropolis) upon the overseers and payable out of the poor rate.

School Attendance.—A school board was authorised (*o*), with the approval of the Education Department, to make bye-laws for securing the attendance of children at school, under which penalties might be imposed for breach by parents of the requirements that their children, between the ages of five and thirteen, should attend school unless reasonable excuse should be shown. This power was later extended to school attendance committees (*p*) and it finally became the duty of the local education authority to make and enforce such bye-laws under the provisions of the Education Act, 1921 (*q*). Now, however, provision is made for compulsory school attendance and its enforcement by the Education Act, 1944, directly, and accordingly all school attendance bye-laws have ceased to have effect (*r*). In a few areas where the bye-laws required attendance (subject to exemptions) until the age of fifteen, this has had the effect of temporarily reducing the school-leaving age to fourteen. The school-leaving age was raised to fourteen by the Elementary Education Act, 1900, and, subject to exemption for children able to pursue a useful employment, it would have been raised to fifteen by the Education Act, 1936, on September 1, 1939, had it not been for the outbreak of war (*s*). Under the Education Act, 1944, the school-leaving age is raised to fifteen years (subject to a power of postponement for a maximum period of two years, which has been exercised), and will be raised to sixteen as soon as practicable (*t*).

Before the close of the nineteenth century several Acts were passed amending the Act of 1870, and these do not need to be dealt with in detail. They all show a widening view of the scope of education.

Elementary education having been made compulsory, it was

(*o*) Elementary Education Act, 1870, § 74.

(*p*) Elementary Education Act, 1876, § 23.

(*r*) §§ 35-40.

(*s*) Education (Emergency) Act, 1939.

(*t*) Education Act, 1944, § 35.

(*q*) § 46.

realised that it could not logically be accompanied by compulsory payment of school fees. Experience also showed that the trouble of collecting school pence was an unnecessary burden on the teachers and interfered with school teaching, and school fees are no longer payable by parents (*u*). It also became clear that elementary education could not be limited to "the three r's," and the code of the Education Department, which replaced in practice the minutes referred to in the Act of 1870, became more complex and the administration of elementary education more expensive (*v*). It became evident about the end of the century that a decisive forward step must be taken in regard to education, and some of the principal elements in this demand may be mentioned.

Defects of School Board System.—While the school boards in large urban areas were usually active and progressive, complaint was made that they were extravagant and that, from the fact that they had precepting powers over the local authority, which could not challenge the amounts demanded of it, they had little or no concern as to the ability of the ratepayers to meet their financial demands.

On the other hand, complaint was made that in rural areas the school boards, often largely composed of persons not really interested in the education of the labourers' children and wishful to avoid addition to the amount of the rates, deliberately kept back progress in education.

A more serious difficulty arose in regard to the position of schools which had not been provided by the school board. These consisted of voluntary schools (then known, as already stated, as non-provided schools) which were in existence when the Act of 1870 came into force and other similar schools which

(*u*) Education Act, 1944, § 61; and see *Gateshead Guardians v. Durham County Council* [1918] 1 Ch. 146; 19 Digest 553, 7. Now that secondary education has also become compulsory, the prohibition of school fees is also applied to secondary schools.

(*v*) In fact, the Education Act, 1944, finally abolishes "the three r's," and they may be regarded as having been replaced by "the three a's," *i.e.* the obligation which is placed on the parent of every child of compulsory school age to cause him to receive efficient full-time education suitable to his *age, ability and aptitude* (§ 36).

had been erected since that time. Most of these schools had been established by representatives of various Churches, whose subscribers wished the tenets of those Churches to be taught in their schools. For a time after 1870 they were able to keep pace with the board schools in the general quality of the teaching they afforded to their scholars. But in course of time the position was changed. The board schools were newer and (except in some rural areas) more efficiently equipped than the voluntary schools. The school boards could engage more competent teachers because they could afford to pay better salaries than could the managers of the voluntary schools. The increasing scope of educational services provided was more costly than formerly. And it may not unfairly be added that the general standard of teaching given at the board schools was so good that many subscribers to voluntary schools ceased their subscriptions, and were aided in coming to that determination by finding that the religious education given in the board schools, while not satisfying the keen partisan, was wholesome and reverent. In these circumstances there was a persistent outcry that the voluntary schools should be placed, as regards parliamentary grants and payments from the local rates, on an equality with the board schools. Not that the voluntary school managers were prepared to transfer their schools to the school boards—that would have been in their minds a negation of their religious principles—nor would they consent to the religious teaching in the voluntary schools being placed under the authority of any body or person other than themselves. They therefore wished to retain full authority to control the teaching of religion while acting in co-operation with the school boards in all matters of general education. Hence arose a difficult position, with the religious question paramount.

Higher Education.—A further difficulty, and a very real one, arose with respect to education other than elementary. The improvement in the quality and extent of elementary education had called attention to the defects in what was some-

times called secondary or higher education, which was unorganised and unregulated. So-called private schools, under no inspection or supervision by any public authority or the State, were, with honourable exceptions, often most inefficiently conducted. It was realised that education generally needed to be co-ordinated and regulated; that clever scholars in the elementary schools should be enabled to obtain technical or other superior education, and even to win their way to the Universities. But technical education was in little more than a rudimentary condition, and the same might be said also of much education other than elementary. Exception must be made of many of the grammar schools of the country and, of course, the great public schools, both of which classes had been subject to special legislation. It was obvious that a national scheme of education to meet the needs of all classes was imperatively necessary if the country was to hold its own in commerce and the arts and sciences.

Education Act, 1902.—The swing of the pendulum against *ad hoc* authorities, which was now apparent, indicated the direction which the amendment of the law regarding education would probably take, and the Education Act of 1902 was the result of the consideration by Parliament of the problems briefly indicated above. The Bill was hotly contested, as so often happens when opposing religious views are aroused, but public opinion soon recognised that the principles laid down in the Act as it emerged from parliamentary conflict were on the whole fair to all parties and that they represented a sound basis for the necessary development of our educational system.

Abolition of School Boards.—In the first place, the school boards and school attendance committees were abolished by the Act of 1902, and their duties, powers and properties were transferred to the county councils and county borough councils (*w*), each of which was to be the local education authority for its area, with the saving that the council of a non-county borough with a population of over ten thousand or of an urban district with a population of over twenty thousand was to be the local

(*w*) Education Act, 1902, § 5.

education authority for its own district for the purpose of Part III of the Act, that is, for elementary education (x).

The policy established in the Education Act, 1902, whereby the local control and administration of education is entrusted to certain classes of local authorities, stood the test of a considerable time and, with the concentration of all functions in the hands of the county and county borough councils effected by the Education Act, 1944, may now be looked upon as a permanent feature of our education system. Except for this concentration of functions, legislation on education passed since 1902 has not disturbed this foundation. Such legislation has been limited in quantity, the three principal Education Acts passed in that period being the Education Act, 1918, which was designed to ensure the progressive development and comprehensive organisation of education throughout the country, the Education Act, 1921, which was a consolidating Act, and the Education Act, 1944, which repealed the previous Acts and now contains the substance of the present law on education. It may therefore be convenient in the remaining part of this chapter to refer to the various steps, commencing with the Education Act, 1902, which led to the consolidated provisions of the Act of 1921, and ultimately to the Act of 1944. This will be of advantage because the Education Act, 1944, presents in orderly sequence the numerous branches of the national education services that are now in operation. A further Bill is now before Parliament and by this it is proposed to correct certain anomalies in the Act of 1944.

Education Committees.—Under the Act of 1902, each council, which became a local education authority, was required to appoint an education committee to which should be referred all matters relating to the exercise by the council of its powers

(x) Education Act, 1902, § 1. Hence such councils were frequently referred to as "Part III authorities" in contradistinction to county and county borough councils, which were authorities under both Part II and Part III of the Act. But no new Part III authorities could be created after 1931 owing to extensions of boundaries or the creation of new non-county boroughs or urban districts: Education (Local Authorities) Act, 1931. And now, by the Education Act, 1944, Part III authorities have been wholly abolished: § 6 and Schd. I.

under the Act, except the power of raising a rate or borrowing money, and such matters might be delegated by the council to the education committee with or without restrictions (y). The council was required in the first instance to prepare a scheme for the approval of the Board of Education providing for the constitution of the education committee, a majority of the members of which were to be members of the council. Other committee members might be co-opted by the council on the nomination or recommendation of various bodies, as the scheme might provide (z). These provisions were continued in the Education Act, 1921 (a), which provided that a scheme, when approved by the Board, should have effect as if enacted in that Act.

Under the Act of 1944, however, a scheme is not necessary. Every authority must, however, establish one or more education committees in accordance with arrangements approved by the Minister of Education, of which a majority of the members must be members of the authority, though every committee must include persons of experience in education and persons acquainted with the educational conditions prevailing in the area. The requirement with regard to the reference of all matters to the committee and the powers of delegation remain unaffected (b). The Act goes further, however, in the case of local education authorities for counties. It requires every such authority, unless the Minister otherwise directs, to prepare a scheme of divisional administration for partitioning the county into such divisions as may be conducive to efficient and convenient administration and for constituting divisional executives for the purposes of exercising such functions relating to primary and secondary education as the scheme may specify. The Ministry may also authorise the inclusion of functions relating to further education in such a scheme. Each county district council is to be consulted upon the form and contents of the scheme, which does not take effect until approved by order of the Minister. Power is given

(y) Education Act, 1902, § 17.

(a) § 4.

(z) *Ibid.*, § 17.

(b) Schd. I, Part II.

to delegate to such divisional executives any of the authority's functions except the power to borrow money or to raise a rate. Before October 1, 1944, borough and urban district councils with a population of 60,000 or an elementary school roll of 7,000 (c) could claim to be excepted from the county scheme, and other such councils might seek to be excepted. If the claim is admitted it becomes the duty of the council of the excepted district to prepare a similar scheme for its area in consultation with the local education authority and to submit the scheme through that authority for confirmation by the Minister (d). The system envisaged by the Act is new to local government and is obviously experimental, but it has been stated in Parliament that it may possibly be regarded as a model when other reforms, such as the establishment of a national health service, are carried out.

Joint Committees, etc.—In accordance with modern practice, two or more councils exercising powers under the Education Acts were authorised to make mutual arrangements for co-operation or combination, by the appointment of either a joint committee or a joint body of managers. This principle was taken further, inasmuch as the Act of 1918 enabled the Board of Education, on the application of two or more such councils, to establish and (if thought fit) incorporate a federation for purposes relating to matters of common interest concerning education. Any such federation might be empowered to perform educational or administrative functions as if it were a joint committee or joint body of managers (e).

Under the Act of 1944, two or more authorities might, with the approval of the Minister, establish a joint education committee for the consideration of questions of common interest, and the Minister may, if he thinks it expedient, require such a joint committee to be established (f). Similarly, provision is

(c) According to the Registrar-General's estimate for June 30, 1939, or according to the school roll on March 31, 1939, respectively.

(d) Education Act, 1944, Sched. I, Part III.

(e) Education Act, 1918, § 6; subsequently Education Act, 1921, § 6.

(f) Education Act, 1944, Sched. I, Part II.

made for the constitution of a single governing body for any two or more county schools or voluntary schools, though, in the case of voluntary schools, only with the consent of the managers or governors (*g*). If the Minister thinks fit, he may establish a joint education board as the local education authority for two or more councils to which Part I of the First Schedule applies and may transfer the educational functions of such councils to the board. The provision applies not only to county and county borough councils, but also to the council of any other borough whose population at the last census before the passing of the Act was not less than half that of the county within which it was situate (*h*). Thus, by this provision, it may be possible for a borough council to obtain a greater voice in the administration of the education service than would otherwise be possible under the Act.

Voluntary (formerly Non-provided) Schools.—The problem in regard to elementary education was met under the Education Act, 1902, by placing the responsibility for the maintenance and efficiency of all public elementary schools upon the local education authority, and this provision was re-enacted in the Education Act, 1921 (*i*), and, in different form, in the Education Act, 1944 (*j*). In the case of non-provided schools some modification of this general obligation was needed. The principle, adopted by the Act of 1902 and re-enacted by the Act of 1921 (*k*), was that in the non-provided schools secular education should be provided by and at the cost of the local education authority, but religious instruction should continue to be under the control of the school managers.

For the purpose of enabling religious education to be given, reasonable facilities were to be afforded during school hours. For each non-provided school the Act of 1902 required a body of managers to be appointed, of whom not more than four were to be "foundation managers" to represent the denominational

(*g*) Education Act, 1944, § 20.

(*h*) Schd. I, Part I.

(*i*) § 17.

(*j*) § 10 (2) (premises); § 23 (instruction).

(*k*) § 29.

or other interest on whose behalf the school was established, and not more than two were to be managers appointed to represent the local education authority (*l*). In many cases the non-provided schools were held upon trust deeds which defined the powers and duties of the managers as well as the character of the religious instruction to be given. By the Education Act, 1902 (*m*), the "foundation managers" were to be the managers appointed under the trust deed, and the Board of Education was empowered to make an order varying the provisions of the trust deed or applying to the case where no trust deed was available, so far as to effect the purpose of the section (*n*). The duty placed upon the local education authority to maintain and keep efficient all public elementary schools within its area has been held to include the obligation to defray the expense of denominational religious instruction lawfully given during school hours in a non-provided school (*o*).

Non-provided schools were not liable to be rated except to the extent of profits derived from lettings (*p*).

Under the Education Act, 1944, the non-provided elementary schools became voluntary schools, which term, however, now includes secondary schools as well. Voluntary schools are classified in three types, controlled, aided and special agreement schools. In all voluntary schools except aided secondary schools, secular instruction is to be under the control of the local education authority. In aided secondary schools it is to be under the control of the governors, though in each case the rules of management or articles of government for the school may vary this general provision (*q*). Religious instruction in voluntary schools is normally to be under the control of the managers or governors. In aided and special agreement

(*l*) Education Act, 1902, § 6 ; subsequently Education Act, 1921, § 30.

(*m*) § 11 ; subsequently Education Act, 1921, § 32.

(*n*) And was given power to vary the order from time to time : see *Falconer v. Stearn* [1932] 1 Ch. 509 ; Digest Supp.

(*o*) *A.-G. v. Yorkshire (West Riding) County Council* [1907] A.C. 29 ; 19 Digest 558, 28.

(*p*) Education Act, 1921, § 167.

(*q*) Education Act, 1944, § 23.

schools the only exception is where the parents of pupils at such schools desire them to receive religious instruction in accordance with an agreed syllabus adopted by the local education authority and the managers or governors are unwilling to make arrangements to that end (*r*). In controlled schools religious instruction is normally to be given in accordance with an agreed syllabus but, where parents of pupils at the school wish them to receive religious instruction in accordance with the trust deed or the previous practice at the school, the foundation managers or governors must make provision for such instruction during not more than two periods per week (*s*). Provision must be made for religious instruction in every county and voluntary school, subject to the parents' right of withdrawal (*t*).

A body of managers or governors is to be constituted for every county school and voluntary school by means of an instrument of management or government made, in the case of a county school, by an order of the local education authority and, in the case of a voluntary school, by an order of the Minister; whilst county and voluntary primary schools are to be conducted in accordance with rules of management made by order of the local education authority, county secondary schools in accordance with articles of government made by the authority and approved by the Minister, and voluntary schools in accordance with such articles made by order of the Minister. Such articles of government are to determine the respective functions of the local education authority, the governors and the head teacher (*u*). Provision for determining the number of managers of county and voluntary primary schools and by whom they are to be appointed is made by the Act (*v*), but the provisions are too complicated to set out in full. In the case of county primary schools the managers are appointed by the authority and the minor authority (*w*) (if any), and in the case of voluntary primary schools the managers are divided into foundation managers (*w*) and ordinary managers. In the case

(*r*) § 28.
(*u*) § 17.

(*s*) § 27.
(*v*) § 18.

(*t*) § 25.
(*w*) Defined in § 114.

of aided or special agreement schools two-thirds are foundation managers, and in the case of controlled schools one-third. If the school is in the area of a minor authority a proportion of the remaining managers are appointed by the minor authority and the remainder by the local education authority ; if there is no minor authority all are appointed by the latter (x).

The number of governors of a secondary school is to be settled by the instrument of government and in the case of voluntary secondary schools the proportion of foundation governors is one-third in the case of controlled schools and two-thirds in the case of aided and special agreement schools (y).

The former duty placed upon local education authorities to maintain non-provided schools is extended to all voluntary schools (z). The exemption of non-provided schools from rates is extended to all voluntary schools, primary and secondary (a).

Maintenance of School Premises.—A more difficult question of apportioning the cost of upkeep of the premises of non-provided schools was settled in the Acts of 1902 and 1921 on the basis that the local education committee should be responsible for all expenditure required for the purpose of maintaining and keeping the schools efficient, except that the managers, in addition to providing the school house free of charge, should keep it in good repair and make such alterations and improvements as the local education authority might reasonably require (b). The local education authority was also required to make good such damage as it should consider to be due to the wear and tear in the use of any room of the school house as a public elementary school. As time went on and standards improved it became more difficult for the managers of non-provided schools to meet their obligations. In the

(x) § 18.

(y) § 19.

(z) § 9.

(a) § 64.

(b) This provision does not render managers liable to carry out and pay for the concrete paving and flagging of playgrounds not so paved or flagged before : *Lancaster County Council v. Crowe* [1929] 1 K.B. 587 ; Digest Supp.

case of senior schools the Education Act, 1936, enabled local education authorities for a limited period to pay not less than 50 per cent. nor more than 75 per cent. of the cost of new non-provided school buildings for senior children, but for their part the managers were required to permit the local education authorities to exercise an increased degree of control, in relation both to the buildings and the appointment and dismissal of teachers.

This arrangement has been carried much further in the Education Act, 1944, one reason being that in the great majority of cases the managers and governors would be quite unable to meet the cost of bringing the school premises up to the standard prescribed under the Act. Attempts were made to abolish the so-called dual system altogether, but the Act continues the system in a modified form. Under it voluntary schools (*c*) are to be of three classes, controlled schools, aided schools and special agreement schools (*d*). Aided schools will receive a grant from the Minister of 50 per cent. of the cost of necessary alterations (*e*), and will be responsible for external repairs only, half the cost being met by the Exchequer; responsibility for internal repairs and repairs to the playgrounds, etc., will rest on the local education authority. Special agreement schools will be schools in respect of which proposals were made under the Education Act, 1936, within the time limit specified, and where, owing to the war, such proposals had not been carried through, they may be revived with appropriate modifications. The provisions for maintenance are similar to those applying to aided schools.

In the case of controlled schools all financial responsibility will pass to the local education authority and, in consequence, the authority is given a greater power of control over such schools than over aided and special agreement schools (*f*).

(*c*) By § 9 (2), voluntary schools are primary and secondary schools maintained by a local education authority (other than nursery or special schools) but not established by such as authority.

(*d*) § 15.

(*e*) § 102.

(*f*) § 15.

Appointment and Dismissal of Teachers. — The managers were formerly required to carry out the directions of the authority as to secular instruction to be given in the school, and for the dismissal of teachers on educational grounds, while the consent of the authority was required to the appointment of teachers, but could not be withheld except on educational grounds (*g*). It has in consequence been held that notices to dismiss teachers from a desire to economise were invalid, as not being based on educational grounds (*h*).

The foregoing provisions of the Act of 1902 were repealed and re-enacted in the Education Act, 1921 (*i*). As has been noticed (*j*), if a grant was accepted under the Education Act, 1936, the relations between the managers and the local education authority were profoundly altered, though this changed relation might have been terminated at any time by repayment of the grant. Until this was done, the obligation to repair, alter and improve the premises to the reasonable satisfaction of the local education authority remained with the managers. But the control over teachers was altered. The local education authority might agree that a certain number of teachers employed should be capable of giving the religious instruction necessary under the school's trust deed: these were called "reserved teachers." But all the teachers were appointed and employed directly by the local education authority, subject, in the case of reserved teachers, to the managers' right of veto on religious grounds. Similarly, teachers in such schools might be dismissed by the local education authority, but the managers might require the dismissal of reserved teachers, but only on religious grounds (*k*). Finally, if the managers found themselves unable to continue the school, the local education authority might obtain the right to use the school under orders of the Board of Education (*l*).

Here again the Education Act, 1944, has very considerably

(*g*) Education Act, 1902, § 7.

(*h*) *Sadler v. Sheffield Corporation* [1924] 1 Ch. 483; 19 Digest 603, 299

(*i*) §§ 29 and 30.

(*j*) See above, p. 712.

(*k*) Education Act, 1936, §§ 8 to 10.

(*l*) *Ibid.*, § 10 and 3rd Schd.

extended this principle. In the case of aided schools the managers or governors will continue to appoint their own teachers (*m*). The position of special agreement schools is similar to that of schools receiving grant under the Education Act, 1936, in that the appointment of teachers rests with the local education authority, subject to their consulting the managers or governors on the appointment of "reserved teachers" to give the denominational religious instruction. The number of reserved teachers is a matter for agreement between the authority and the managers or governors (*n*). In controlled schools, however, the local education authority is responsible for the appointment and dismissal of the teachers, but must consult the managers or governors about the appointment of the head teacher and must satisfy the foundation managers or governors as to the fitness and competence of persons proposed to be appointed as "reserved teachers." The number of reserved teachers is not to exceed one-fifth of the teaching staff and no reserved teacher may be appointed where the total staff is not more than two (*o*).

Extensions of Educational Services.—Here it may be useful to refer to the extension of facilities for elementary education in three directions :

- (1) provision for children who are physically or mentally disabled,
- (2) provision of food and travelling facilities and restraint on employment, and
- (3) extensions of the scope of facilities afforded.

(1) Provision for Children physically or mentally disabled.—The introduction of compulsory education for all children brought to light that there are many who, by reason of physical or mental disability, are incapable of receiving instruction along with other children. In the two decades following the passing of the Education Act, 1870,

(*m*) Education Act, 1944, § 24 (2).

(*o*) §§ 24 (1), 27.

(*n*) §§ 24 (1), 28 (3), (4).

attention was almost exclusively given to the educational needs of normal children, but the statutory requirement, that all children between the ages of five and thirteen (*p*) should attend school, necessarily led to a consideration of the claims of other children, suffering from various disabilities, to be afforded such facilities for education as they could profit by. They are educable, but not to the same extent and in the same way as normal children, and they can only be effectually educated by being taught in special schools or classes apart from other children. As individuals their lives can be brightened and their mental outlook improved by suitable instruction, while the State has an interest in the development of such powers as they possess.

The Legislature accordingly made provision in 1893 and 1899 for affording facilities for elementary education for children who are blind and deaf and for any children who are defective or epileptic.

(a) **Blind and Deaf Children.**—The Elementary Education (Blind and Deaf Children) Act, 1893, placed the duty upon parents to cause their blind or deaf children to receive suitable elementary education (*q*), and also required the education authorities to enable such children up to the age of sixteen to obtain the requisite education. For that purpose the education authorities were authorised to build or to give financial support to special schools (*r*).

(b) **Defective and Epileptic Children.**—A somewhat similar procedure applicable to defective and epileptic children was embodied in the Elementary Education (Defective and Epileptic Children) Act, 1899 (*s*). Defective children for the

(*p*) Elementary Education Act, 1870, § 74; subsequently raised to fourteen: Elementary Education Act, 1900, § 6 (1); and to be raised to fifteen before April 1, 1947, and ultimately to sixteen: Education Act, 1944, § 35.

(*q*) § 1.

(*r*) §§ 2 (1) and 11. Subsequently Education Act, 1921, § 52, and Education (Deaf Children) Act, 1937.

(*s*) Subsequently Education Act, 1921, §§ 54 to 56.

purposes of the Act were not, on the one hand, imbeciles, or, on the other hand, children who were merely dull or backward, but those who, while unable to benefit by instruction at an ordinary school, were capable of receiving instruction at a special class or school.

Epileptics were those who, not being idiots or imbeciles, were prevented by severe epilepsy from attending ordinary schools. For them also special classes or schools were required to be provided, and power was given to the local education authority to board out such children in houses conveniently near to a special class or school so provided.

General provisions applying to blind, deaf, defective and epileptic children provided that the period of compulsory education should extend to their attaining the age of sixteen years, that parents according to their ability should contribute towards expenses incurred by the local education authority in respect of the children, and that grants might be made by the Board of Education to certified schools in respect of the education given to such children.

The Education Act, 1944, §§ 33 and 34, replace the above-mentioned provisions and make a much fuller and better provision for children handicapped by physical or mental disabilities. In the first place, the two sections extend the duty of ascertainment, hitherto confined to defective and epileptic children, to all types of children (*t*) needing special educational treatment, *i.e.* education in special schools or otherwise, by special methods appropriate for persons suffering from any disability of mind or body. Thus for the first time provision is made for what are known as maladjusted children. Secondly, the requirement that a handicapped child must be certified as mentally or physically defective before he can be provided with

(*t*) By reason of the definition of "child" in § 114, this duty applies to children even though they are below five years of age, and the parent of any child of two years or over may be required to submit him for medical examination : § 34 (1).

education suited to his needs is removed. In future, no child will be certified as mentally defective so long as he remains within the education system (*u*), but local education authorities are required to provide special educational treatment for the less severely handicapped children within the ordinary schools and for the more severely handicapped in special schools.

The Act also deals with children who are found to be incapable of receiving education at school, and requires the issue of a report to that effect so that action may be taken under the Mental Deficiency Act, 1913 (*v*).

The upper age limit of compulsory school age for pupils at special schools remains at sixteen, and such a pupil may not be withdrawn from the school without the authority's consent (*w*).

(2) Provision of Conditions suitable for Education.—

The second group of special services afforded to children, or classes of children, comprise the provision of meals, medical inspection and treatment, facilities for travelling to school and also the regulation of the employment of children.

(a) Provision of Meals for Children.—Children insufficiently fed are not in a condition to take up their studies effectively, and so long ago as 1906 it was enacted (*x*) that a local education authority under Part III of the Education Act, 1902 (*y*), might provide meals for children in attendance at any public elementary school in its area, the cost to be recovered from the parent, unless by reason of circumstances other than his own default he was unable to pay the amount. The amount which might be expended on this service was not to exceed the product of a rate of one halfpenny in the pound over the area of the authority (*a*). A parent was not to be disfranchised by reason of not being able to repay to the authority the cost of

(*u*) § 34.

(*v*) § 57.

(*w*) § 38.

(*x*) Education (Provision of Meals) Act, 1906.

(*y*) That is, an authority charged with the provision of elementary education.

(*a*) § 3; the amounts actually recovered from parents did not usually defray the cost incurred by the authority.

meals so supplied to his child (*b*). This method of relieving parents of responsibility has been criticised on various grounds ; in practice it has been of immense advantage to the physique of the poor. The Act of 1906 was repealed by the Education Act, 1921, but its provisions in substance were re-enacted in §§ 82 to 85 of the latter Act, the limitation of the amount which may be expended on this service having been removed.

Since the outbreak of war the school meals service has been greatly expanded to ensure that even with food rationing the health and nutrition of school children would be fully maintained, and to meet the situation caused by the large-scale employment of married women in war work. The Education Act, 1944, converts the present power of local education authorities to provide milk and meals into a duty (*c*), applies it to all schools and colleges maintained by the authority, and envisages a continuance of the war-time expansion of the service. The exact scope of the duty is left to the Minister to determine by means of regulations, this course being adopted because the position with regard to meals and milk remained for further consideration in connection with the Government's scheme for children's allowances (*d*).

(b) Medical Inspection and Treatment.—In the Education (Administrative Provisions) Act, 1907 (*e*), the duty was imposed upon a Part III authority of providing for the medical inspection of children admitted to public elementary schools, with power to make arrangements, if sanctioned by the Board of Education, for attending to the health and physical condition of the children educated in such schools. The interpretation put upon this duty by the authorities has been generous, and the school medical service has grown to be one of the principal organisations associated with our educational system. Large numbers of medical men and women and nurses are giving full-time attention to this service, and the improvement that

(*b*) § 4.

(*c*) § 49.

(*d*) Report on Social Insurance and Allied Services, 1942 (Cmd. 6404) ; White Paper on Social Insurance, 1944 (Cmd. 6550-1).

(*e*) § 13.

has been effected in the health of school children has been considerable. The Act of 1907 assumed that in this service the authorities should supplement the work of voluntary agencies : in fact, it has surpassed all that voluntary agencies could do.

The responsibility of the parent for the cost of medical treatment afforded to his child under the Act of 1907 was recognised in the Local Education Authorities (Medical Treatment) Act, 1909, by requiring the parent of a child who has received such medical treatment to repay to the local education authority the cost of treatment. The Act affirmed the right of the parent to decline to submit his child to medical inspection or treatment under the Act of 1907—a right that is, happily, seldom if ever exercised. The usefulness of this service was emphasised in the Education Act, 1918, which (f) enabled the above provisions to be applied to children attending secondary schools and other institutions, even if not provided or assisted by the local education authority. All the above provisions were repealed by the Education Act, 1921, and re-enacted therein (g). To allay any fears that the school medical department might be trespassing unduly upon the rights of the medical profession generally, it was directed that while a local education authority might co-operate with voluntary agencies, it could not establish a general domiciliary service for children or young persons, and also that in making arrangements for such treatment the authority should consider how far it could avail itself of the services of private medical practitioners.

Once again the Education Act, 1944, repealing the previous provisions, establishes an extended school medical service (h), though the provisions are likely to be of a temporary nature in view of the Government's proposals to establish a comprehensive national health service (i).

The Act requires all local education authorities to provide for the medical inspection and treatment of all children and

(f) § 18.

(g) §§ 80 and 81.

(h) § 48.

(i) White Paper on "A National Health Service," 1944 (Cmd. 6502).

young persons attending maintained schools and county colleges (*j*), and of taking such steps as may be necessary to ensure that those found to be in need of treatment, other than domiciliary treatment, receive it free of cost.

(*c*) **Physical Training.**—Another extension of the powers of local education authorities was provided by § 17 of the Education Act, 1918 (*k*), which authorised arrangements to be made for the supply or maintenance of holiday or school camps (especially for young people attending continuation schools), centres and equipment for physical training, swimming baths and other facilities for social and physical training. The facilities could be afforded by Part III authorities as respects children attending public elementary schools and by Part II authorities (*i.e.*, county and county borough councils) as respects persons of any age (*l*).

These provisions were repealed and replaced by § 53 of the Education Act, 1944, which requires local education authorities to secure that the facilities for primary, secondary and further education in their area include adequate facilities for recreation and social and physical training, and states, in some detail, how such provision may be made.

(*d*) **Travelling and Boarding Facilities.**—The Education Act, 1918 (*m*), authorised provision to be made by Part III authorities to meet the case of scholars who, by reason of the remoteness of their homes or other exceptional circumstances, were not in a position to receive the full benefit of education provided by the authority. In such cases the authority might, with the approval of the Board of Education, make arrangements, including the provision of board and lodging, for enabling those children to receive the benefit of efficient elementary education.

(*j*) See p. 724.

(*k*) Subsequently the Education Act, 1921, § 86.

(*l*) Education Act, 1921, § 86, as amended by the Physical Training and Recreation Act, 1937, § 6.

(*m*) § 21; subsequently Education Act, 1921, § 23.

Under the Education Act, 1944, local education authorities—

- (1) must take steps to secure the provision of boarding accommodation, either in boarding schools or otherwise, for pupils for whom education as boarders is considered by their parents and the local education authority to be desirable (*n*);
- (2) may provide boarding accommodation in suitable cases otherwise than at a school or college (*o*);
- (3) must make such arrangements as they think necessary or as the Minister may direct for the provision of transport (free of charge) to enable pupils to attend schools or county colleges or any course or class of further education (*p*).

Provision is made for the recovery, in suitable cases, of the cost of providing boarding accommodation otherwise than at a school or college (*q*).

(e) **Employment of Children.**—The desirability of regulating the employment of children, so as to prevent undue physical strain and other evils, found legislative utterance in the Employment of Children Act, 1903, which imposed certain restrictions upon the hours during which children might be employed, and empowered local authorities to make bye-laws regulating the employment of children under fourteen. The Act also prohibited the employment of children under eleven years of age in street trading and permitted bye-laws relating to street trading to be applied to children under the age of sixteen.

The corresponding provisions are now found in Part II of the Children and Young Persons Act, 1933, and the Education Act, 1944, § 59.

The Act prohibits the employment of children under the age of twelve years, limits the hours within which children may be employed and directs that no child shall be employed

to lift, carry or move anything so heavy as to be likely to cause injury to him. A local authority may make bye-laws, with respect to the employment of children, of a more stringent nature than those authorised by the Act of 1903 (*r*). Further, the authority may make bye-laws with respect to the employment of persons between the ages of fourteen and eighteen years (*s*); while with respect to street trading the Act directs that no person under the age of sixteen shall be engaged therein, except when employed by his parents, in accordance with bye-laws made by the local authority. The local authority may make bye-laws for regulating or prohibiting street trading by persons under the age of eighteen (*t*).

(3) Extension of Educational Facilities.—The third group illustrates the wider range of service which education now affords. The earlier idea that facilities for education should be limited to the years between five and thirteen has been extended in either direction, while the scope of education has also been extended.

(a) Scholarships.—In the first place, attention may be directed to § 81 of the Education Act, 1944, which enables the Minister to make regulations empowering local education authorities—

- (a) to defray such expenses of children attending county schools, voluntary schools or special schools, as may be necessary to enable them to take part in any school activities;
- (b) to pay the whole or part of the fees and expenses payable in respect of children attending schools at which fees are payable;
- (c) to grant scholarships, exhibitions, bursaries, and other allowances in respect of pupils over compulsory school age, including pupils undergoing training as teachers;

(*r*) Children and Young Persons Act, 1933, § 18.

(*s*) *Ibid.*, § 19. The lower age of fourteen will, however, rise with the raising of the school-leaving age: Education Act, 1944, § 58.

(*t*) *Ibid.*, § 20.

- (d) to grant allowances to children awarded scholarships, etc., before Part II of the Act came into operation (u).

(b) **Nursery Schools, etc.**—Then by the Education Act, 1918 (v), Part III authorities were authorised to make arrangements for the supply of nursery schools and classes for children over two and under five years of age, whose attendance at such a school was necessary or desirable for their healthy physical and mental development. They were also authorised to arrange for attending to the health, nourishment and physical welfare of children attending nursery schools. The Board of Education was authorised to pay grants-in-aid of any nursery schools which were open to inspection by the local education authority, and on the body of management of which at least one-third of the members was appointed by the local education authority (w).

Under the Education Act, 1944, these provisions were replaced by a requirement to secure provision for pupils under the age of five at nursery schools or at nursery classes in other schools (x). The payment of grant to other nursery schools is now covered by the general grants provision of the Act (y).

Local education authorities for elementary education were also empowered to provide vacation schools and play centres (z), as well as schools for affording practical instruction. They could also organise advanced instruction for older or more intelligent children, including those who stayed at school beyond the school-leaving age (a). Elementary education, in short, passed beyond its original content : while not “secondary” it was approaching this level under the designation of “post-primary.”

(u) Similar but more limited powers were first given by the Education (Administrative Provisions) Act, 1907, § 11, and Education Act, 1918, § 24, and subsequently by the Education Act, 1921, § 24.

(v) Subsequently Education Act, 1921, § 21.

(w) Education Act, 1921, § 119.

(x) § 8 (2) (b). And see § 9 (4).

(y) § 100.

(z) Education (Administrative Provisions) Act, 1907; subsequently Education Act, 1921, § 22.

(a) Education Act, 1918, § 2; subsequently Education Act, 1921, § 20.

This has been recognised in the Education Act, 1944, by the abolition of the distinction between elementary and higher education, and the division of the new single system of public education into three progressive stages; the primary stage, up to the age of 11 +; the secondary stage, up to school-leaving age and beyond; and further education, for pupils who have passed school-leaving age, including, of course, adults (b).

(c) **County Colleges.**—The Act of 1918 imposed a duty upon every county council and county borough council, so far as its powers extended, to provide for the progressive development and comprehensive organisation of education in its area and to submit schemes to the Board of Education showing how it proposed to perform such duties. Also co-operation was required between Part II authorities (c) and the elementary education authorities, for preparing children in elementary schools for transference to higher schools. Part II authorities were also called upon to make provision for continuation schools, at which courses of study, instruction and physical training were to be provided, without payment of fees, for all young persons in their areas; and the statute placed all young people under an obligation to attend these schools on a part-time basis. Before submitting schemes the local education authorities were to consider any representations made by parents and persons or bodies interested (d). These provisions were re-enacted in the Education Act, 1921 (e), though in fact very little use was made of them.

Not later than April 1, 1950, the Education Act, 1944, however, is to require local education authorities to establish and maintain what are to be known as county colleges, at which provision is to be made for the compulsory part-time education in working hours of young persons up to the age of eighteen (f).

Further Education.—The approach to higher education (by which term all education other than elementary was for-

(b) Education Act, 1944, § 7.

(c) *I.e.*, higher education.

(e) §§ 75 to 78.

(d) Education Act, 1918, §§ 2, 3, 4 and 10.

(f) Education Act, 1944, §§ 43-46.

merly known) was necessarily of a more general character, and was directed in the first instance to securing adequate supervision and co-operation. And here again, following the principle laid down in 1870 with respect to elementary education, it was not sought by the Education Act, 1902, to abolish or take over compulsorily then existing schools, but to fill up the gaps in higher education and secure the provision of an ordered and well-directed educational system. Consequently, the Part II authorities (*g*) were directed to survey the educational position in their areas and, after consultation with the Board of Education, to take steps to supply or aid the supply of education other than elementary and to promote the general co-ordination of all forms of education. In this connection the authority was required to have regard to any existing supply of efficient schools or colleges and to any steps already taken for the purposes of higher education under the Technical Instruction Acts, now repealed (*h*).

The generality of these provisions has proved of considerable advantage to local education authorities when formulating proposals with respect to higher education. Conditions in regard to such education varied greatly throughout the country. In some cases it was found practicable for the local education authority to take over existing grammar schools and other endowed schools and to re-arrange their use. In others, existing schools were enlarged or assisted. In all areas consultation with the Board of Education helped to effect a similarity, if not equality, of co-ordination and development with other areas. Generally it may be said that a great advance was made in the provision of a high standard of secondary education.

The councils of counties and county boroughs were limited, however, by the Education Act, 1902, to an expenditure on higher education not exceeding the product of a twopenny rate, while the councils of non-county boroughs and urban districts might spend up to the amount produced by a penny rate.

(*g*) *I.e.*, councils of counties and county boroughs.

(*h*) Education Act, 1902, § 2.

The former restriction disappeared but the latter remained until the functions were transferred to the county councils by the Education Act, 1944 (*i*).

Education other than primary and secondary is now known as further education (*j*), and it is now a duty of local education authorities to secure the provision for their areas of adequate facilities for further education, which is defined as :—

- (a) full-time and part-time education for persons over compulsory school age ; and
- (b) leisure-time occupation, in such organised cultural training and recreative activities as are suited to their requirements, for any persons over compulsory school age who are able and willing to profit by the facilities provided for that purpose.

This provision is to be made in two ways :—

- (a) by the provision of county colleges, as already mentioned ; and
- (b) by preparing and, after approval by the Minister, by carrying out schemes of further education (*k*).

Development Plans.—It is not possible to leave the subject of the educational functions of local education authorities without referring to the duties which have been imposed upon them by the Education Act, 1944, of securing that there are sufficient schools in their areas for providing primary and secondary education. In the first place every local education authority, in fulfilling this duty, is, in particular, to have regard :—

- (a) to the need for securing that primary and secondary education are provided in separate schools (except in the case of special schools) ;
- (b) to the need for securing adequate provision of nursery schools and nursery classes ;

(*i*) § 6 and Schd. I.

(*k*) *Ibid.*, § 42.

(*j*) Education Act, 1944, § 41.

- (c) to the need for securing adequate provision, in special schools or otherwise, for special educational treatment ; and
- (d) to the expediency of securing sufficient boarding accommodation, in boarding schools or otherwise (*l*).

For this purpose, every local education authority is required to survey the position in its area and within a limited period prepare and submit to the Minister a development plan showing the action proposed to be taken to comply with the above-mentioned duties and the successive measures by which it is proposed to accomplish that purpose (*m*).

The plan is to give details of all proposals and is to consult the managers and governors of all schools, other than county schools, which appear to be affected by the plan.

After considering objections, the Minister may approve the plan, with or without modifications (*n*). Approval does not, of itself, affect the duties of the authority but the duty of carrying out the plan may be imposed by means of a local education order made by the Minister which is to specify the county and voluntary schools to be maintained by the authority and, so far as desirable, define the duties of the authority with respect to the measures to be taken for securing a sufficiency of primary and secondary schools for the area, and to make provision as to which of the schools maintained or assisted by the authority for providing primary and secondary education shall be primary and secondary schools respectively, and as to which (if any) are, for the time being, to provide both (*o*).

The order will continue to regulate the duties of the authority and is to be amended by the Minister whenever necessary. If an authority is aggrieved by an order it must be laid before Parliament and may be annulled by resolution of either House within forty days.

Expenses of Local Education Authorities.—The expenses of local education authorities under the Act of 1902,

(*l*) *Ibid.*, § 8.

(*m*) *Ibid.*, § 9.

(*n*) § 11.

(*o*) § 12.

so far as not provided by parliamentary aid grants, were to be paid, in the case of county councils, out of the county rate, and in boroughs out of the borough fund or rate; and, as has already been mentioned, the accounts of a council in respect of education were to be kept separate from its other accounts and were made subject to audit by the district auditor (*p*).

Under the Education Act, 1921, as modified by the Rating and Valuation Act, 1925, the expenses of providing education were payable in boroughs out of the general rate, and in counties out of the county fund, but there were special provisions in the Act of 1921, which enable county councils, acting as education authorities, to charge certain expenses on districts deemed to have derived benefit from that expenditure, and which at the same time prohibited county councils from raising within boroughs, whose councils were local education authorities for elementary education, any sums on account of expenditure incurred elsewhere in the county for purposes of elementary education (*q*).

In consequence of the concentration of functions in the hands of the county and county borough councils, these provisions no longer apply, and the expenses are now payable in accordance with the Local Government Act, 1933.

Education Grants.—In order to enable the local education authorities to meet their increased expenditure on elementary education, a new basis of parliamentary grants was determined by the Act of 1902 (*r*), but since 1918 this basis has been abandoned, and grants have been governed by the provisions of § 118 of the Education Act, 1921, as amended by the Economy (Miscellaneous Provisions) Act, 1926, and the National Economy (Education) Order, 1931 (*s*), under which the parliamentary grant was based on the net expenditure of the authority recognised by the Board of Education as expenditure

(*p*) Education Act, 1902, § 18.

(*q*) Education Act, 1921, § 122.

(*r*) § 10. Each local education authority was to receive annually a sum equal to four shillings per scholar in average attendance, together with three-halfpence per scholar for every twopence per scholar by which the product of a penny rate fell short of ten shillings per scholar.

(*s*) S.R. & O., 1931, No. 811.

in aid of which grants should be made. The grants were made out of moneys provided by Parliament, as substantive grants in aid of education in accordance with regulations made by the Board. In general, if the total sums payable under these regulations fall short of one-half of the expenditure, deficiency grants, sufficient to bring the total grants up to the minimum figure of one-half the net expenditure, were paid by the Board, but a deficiency grant was not to be paid so as to make good any deductions from a substantive grant.

Under the Education Act, 1944, a new system is adopted. The general provisions with regard to the payment of grant are contained in §§ 100 and 101 of the Act, and under the provisions a single combined grant has been introduced for all forms of education as from April 1, 1945. This grant will be paid under three headings :—

- (a) a main grant to each authority based on the percentage which the total grants for education for that authority's area bore to the corresponding expenditure on education in 1938-39. This percentage is to be increased by stages to a total increase of 5 in the fourth year (1948-49) ;
- (b) additional grants to the poorest areas ; and
- (c) grants at special rates in respect of expenditure on school meals and milk.

In the areas of former authorities for elementary education only, the power to raise a rate for educational purposes has been lost to the county council, and the rate as fixed by the county council now applies to the areas of those former authorities. Apart from any variation in the rate levied owing to the implementation of the Act, there would have been a sudden change in the rate required in those areas if the rate levied differed considerably from that made by the county, and in some cases the increase or decrease would have been substantial. To prevent this shock in the more serious cases where the increase or decrease would have been more than 6*d.* in the years 1938-39 provision is made in the Act (*t*) for the application of the

(*t*) Education Act, 1944, § 110.

formula described in the Seventh Schedule for a period up to five years. The general effect of this formula is that, in those areas where it is applied, the rate levied will increase or decrease by stages each year until it equals that levied in the county as a whole.

Teachers.—A sketch of the law and practice with respect to education would not be complete without a special reference to the teachers upon whose services so much of the success of our educational system depends. They now form a great profession and exercise an influence not only in the schools, but upon the policy of the State and the local authorities. The provision of training colleges for prospective teachers has led to the attainment of a higher standard of qualification of the teachers.

There is little direct reference to teachers in the Education Acts. The Elementary Education Act, 1870, authorised a school board to appoint teachers, required for any school provided by that board, to hold office during the pleasure of the board, and to assign them such salaries or remuneration (if any) as the school board thought fit, and from time to time to remove any of such officers (*u*). This provision, now repealed, was re-enacted in the Education Act, 1921 (*v*). The arrangements with reference to the appointment of teachers in non-provided schools have already been referred to (*w*). To encourage suitable persons to follow the profession of teacher the Minister of Education is authorised to make grants for their maintenance, education and training, subject to an undertaking being given by each such person that he will complete the requisite course of training and will subsequently follow the profession of teacher, and that, if he should fail to do so, he will repay to the Minister a specified part of the grant. The duties of the Minister and of local education authorities as to the training of teachers are now contained in § 62 of the Education Act, 1944, whilst § 89 makes provision for their remuneration.

(*u*) § 35. (*v*) § 148. Now the Education Act, 1944, § 24.

(*w*) See above, p. 713.

Under the provisions of various Acts, commencing with the Elementary School Teachers (Superannuation) Act, 1898, school teachers, who are certified by the Minister of Education in accordance with rules made by the Treasury and the Minister, are entitled to receive superannuation and other allowances on retiring from the service. The law on this subject is now contained in the Teachers (Superannuation) Acts, 1918 to 1945.

Libraries and Museums.—There are other services of an educational character to which we may now turn. The conception that a duty lies upon the community to provide libraries, museums and art galleries for the use of the public was only slowly realised and attempts to carry this idea into practice met with a strong opposition over a long series of years. The State had never considered it to be its duty to provide libraries for the benefit of the public, and it was not until the fifties of the last century that the Legislature empowered certain local authorities to establish free public libraries and to defray out of the rates the cost of their establishment and maintenance. But these Acts were adoptive and required the first step for their initiation to be taken by at least ten ratepayers, while the decision whether to adopt them rested with a meeting of ratepayers. In any event the powers to provide libraries which they conferred were limited by the provision that the library rate must not exceed one penny in the pound.

Libraries.—A definite advance was made in 1892, when Sir John Lubbock introduced into Parliament a Bill which became the Public Libraries Act, 1892. It is an adoptive Act and is still in force, although some of its provisions have been modified. It re-imposed the requirement that a direct appeal should be made to the local government electors of the district before the Act could be put into operation. The still prevailing fear of extravagance in expenditure led to the retention of the limitation to a penny rate for the purposes of the Act. Indeed, it might be made a condition of the adoption of the Act that the expenditure permissible should not exceed

a rate of either one halfpenny or three farthings. These financial restrictions have been removed by the Public Libraries Act, 1919 (x).

The districts in which the Act of 1892 might be adopted were municipal boroughs, urban districts, and, in rural areas, the parishes. In boroughs the council and in urban districts the improvement commissioners or local board (y), and in parishes library commissioners appointed by the vestry were to carry the Act into execution when it had been adopted (z).

The procedure for adopting the Act was cumbersome and is now out of date. A requisition was prepared, signed by at least ten voters, and forwarded to the local authority (a). The requisition might merely ask that the Act be adopted for the district, or it might also ask that the limit of the library rate should be less than one penny in the pound, or that arrangements should be made with a neighbouring parish or parishes for combining their districts into one library district.

Following the receipt of the requisition, a poll of voters in the district (being county electors or burgesses) was taken, and voting papers were delivered or sent by post to the voters, and subsequently collected. After an unfavourable ballot there might be no further vote taken within a year thereafter (b).

The general experience of the operation of the Act and a lessening fear of its supposed dangers led to the passing of the Public Libraries (Amendment) Act, 1893, which, so far as it related to urban districts, repealed so much of the Act of 1892 as required the opinion of the voters of the district to be ascertained before that Act could be adopted, and enacted that for the future the Act of 1892 might be adopted in an urban district by resolution of the urban authority at a meeting of which one month's special notice had been given and which had been publicly advertised. A copy of the adopting resolution was to be sent to the Local Government Board.

The Public Libraries Act, 1919 (c), finally abolished the

(x) § 4.

(y) After the Local Government Act, 1894, the urban district council.

(z) Public Libraries Act, 1892, §§ 1, 2 and 4.

(a) *Ibid.*, § 3.

(b) *Ibid.*, § 3.

(c) § 7.

necessity for any special procedure for the adoption of the Acts in the case of an urban authority. Thereafter any resolution passed in accordance with the ordinary procedure of the council has been fully effective.

The passing of the Local Government Act, 1894, by which a new local government organisation was set up in rural parishes, also afforded an opportunity for amending the provisions of the Public Libraries Act, 1892, in so far as they related to areas outside urban districts. Henceforth the provisions of the Act were only to be adopted by the parish meeting of a rural parish and the requisite poll was to be taken in accordance with the general rules in the Act of 1894. Moreover, in a rural parish having a parish council that council was to become the library authority for the execution of the Act of 1892 (*d*). In the future library commissioners were to exist only in parishes which had adopted the Public Libraries Act of 1892 and had no parish council.

The problem of the rural areas is, however, special. The single parish authority has been too small to do more than provide a few books for the residents in its area, and a combination of parish authorities for the administration of the Library Acts has been almost everywhere impracticable. It was largely owing to this aspect of the case that the Public Libraries Act, 1919, was passed. It was expected that large numbers of men returning from the War would settle in rural areas and would thus increase the difficulty of the problem already existing.

The Public Libraries Act, 1919, is largely an amending Act, and does not disturb the basis laid down in the Public Libraries Act, 1892. It begins by authorising county councils to become library authorities (*e*). This a county council can effect by passing a resolution to adopt the Public Libraries Acts for the whole or part of its county, but exclusive of any part in which those Acts are already effectively in force. Upon passing such a resolution the county council becomes the

(*d*) Local Government Act, 1894, § 7.

(*e*) Public Libraries Act, 1919, § 1.

library authority of the area specified in the resolution, and may borrow for the purposes of those Acts.

A library authority of an existing library area, not being the council of a county borough, may by agreement relinquish its powers and duties under the Public Libraries Acts in favour of the county council, and may transfer its property and rights to the county council (*f*).

The county councils have exercised to a large extent their powers under the Act of 1919, and are affording an adequate supply of books for public use in the villages and small towns. The distribution of books is usually made from elementary school premises.

Power is given to county councils, by whom a resolution to adopt the Public Libraries Acts has been passed, to apply to the Board (now the Minister) of Education for an order rescinding the resolution as respects a specified district, and the Minister is empowered to make an order accordingly. The county council in such case must be satisfied before making the application that the order, if made, will tend to the better carrying into effect of the Public Libraries Act in the district.

An urban authority which is a library authority may, if it thinks fit, appoint a committee and delegate to it all or any of its powers of management and control and to the extent of the delegation the committee is deemed to be the library authority. Persons who are not members of the authority may be appointed to be members of the committee (*g*).

Moreover, a library authority may refer matters relating to the exercise of its public library powers to its education committee, and may delegate to that committee any of those powers except the power to raise a rate or borrow money; while, if an authority which is also a local education authority adopts the Acts thereafter, all such matters must be referred to its education committee (*h*). The Act also repealed § 2 of the

(*f*) Public Libraries Act, 1919, § 2.

(*g*) Public Libraries Act, 1892, § 15 (3).

(*h*) Public Libraries Act, 1919, § 3. Formerly this provision applied to library authorities which were also local education authorities for higher education but, by virtue of the Education Act, 1944, § 6 and Schd. 1.,

Public Libraries Act, 1892, which limited the amount that might be expended for the purposes of that Act to the product of a rate of one penny in the pound, and empowered a county council to charge expenses incurred by it under the Public Libraries Acts on any parish or parishes served by an institution provided under those Acts (*i*).

The Act of 1892 (*j*) when adopted authorised the provision of libraries, museums, schools for science, art galleries and schools for art. Of these the power to establish schools for science and schools for art was repealed by the Public Libraries Act, 1919 (*k*), these subject-matters now being directly within the functions of local education authorities (*l*).

For the purposes of the Acts power is given to the library authority to acquire by agreement and hold land, and to erect, equip and furnish buildings, and provide, and when necessary bind and repair books, newspapers and maps. The general management and control of every library and museum provided under the Acts is vested in the library authority, who may appoint officers and servants and make regulations for the safety and use of the library and museum and for the admission of the public thereto (*m*). Library authorities were also empowered to make arrangements for sharing the cost of purchase and maintenance of libraries and books and newspapers, and for their management.

In 1898 it was enacted (*n*) that penalties might be imposed for disorderly conduct in any library or reading room provided under the Act of 1892, while in 1901 (*o*) power was given to library authorities to make bye-laws for regulating the use of libraries, requiring from borrowers of books security against

county and county borough councils are the local education authorities for all purposes and the section therefore continues to apply as before.

(*i*) Public Libraries Act, 1919, § 4.

(*j*) § 11.

(*k*) § 8.

(*l*) Education Act, 1944, § 41; formerly Education Act, 1921, §§ 70 to 73.

(*m*) Public Libraries Act, 1892, §§ 11 to 17. Power to acquire land compulsorily was conferred in certain circumstances by the Public Libraries Act, 1919, § 6.

(*n*) Libraries Offences Act, 1898.

(*o*) Public Libraries Act, 1901.

loss, and excluding or removing from libraries persons committing offences against the Act of 1898 or the bye-laws.

While the Public Libraries Act above referred to gave powers to establish and manage museums as well as libraries, the Museums and Gymnasiums Act, 1891, had also given similar powers in urban districts. By that Act an urban authority was empowered to provide and maintain museums for the reception of local antiquities and other objects of interest, and also gymnasiums. The Act was adoptive and the procedure for securing its adoption was similar to that laid down in the Public Libraries (Amendment) Act, 1893, that is, by special resolution of the authority. The Act of 1891 directed that museums and gymnasiums provided under its powers should be open to the public free for three days in every week, and subject thereto the urban authority might charge for admission and might grant the use of the premises for the delivery of lectures. Power was also given to the authority to acquire land by agreement and to sell the land and buildings thereon after a period of seven years, if it should be found that they were too expensive to retain. The power given to local authorities to adopt the Museums and Gymnasiums Act, 1891, so far as it permitted the provision of museums, was, however, repealed by the Public Libraries Act, 1919 (*p*), while the rest of its provisions were repealed by the Physical Training and Recreation Act, 1937 (*q*).

Physical Training.—The necessity of adequate means of physical training was realised as pressing not long before the war and by the Physical Training and Recreation Act, 1937, machinery was provided for satisfying the need, though parts of the Act have been repealed and replaced by the Education Act, 1944 (*r*). A marked feature of the Act is the co-operation it envisages between local authorities and voluntary organisations. The Act empowers the Board (now the Minister) of

(*p*) § 9.

(*q*) Schd. (itself partly repealed and replaced by the Education Act, 1944, § 53).

(*r*) § 53. Repeals effected by § 121 and Schd. IX.

Education to make grants towards the capital cost of the provision of facilities for physical training and recreation by local authorities and voluntary organisations, the training of teachers and leaders and, in exceptional cases, the maintenance costs of voluntary organisations (*s*). To assist the Board in its tasks there was at first set up a National Advisory Council for Physical Training (*t*) acting by means of local committees consisting of representatives of local authorities and voluntary organisations (*u*). The work of the National Advisory Council was indefinitely suspended at the outbreak of war and since it was felt that the provision of facilities for recreation and physical training could be more effectively secured in other ways the council has been brought to an end (*v*). Local authorities, including the councils of counties, county boroughs, county districts and parishes, are given power to provide gymnasiums, playing fields, holiday camps, camping sites and "community centres," and either to manage them or to let them at nominal or other rents to other persons or voluntary associations. County councils are given power to provide swimming baths and bathing places (*w*), a power already enjoyed under the Public Health Act, 1936 (*x*), by other local authorities. They may also provide wardens, teachers or leaders, and may contribute to voluntary organisations providing similar facilities or swimming baths or bathing places (*y*). Lastly, local education authorities were empowered to promote the social and physical training of persons of any age (*z*).

These provisions of the Act of 1937 which empower local authorities in general to provide facilities for recreation and physical training remain in force, but in addition to the repeal of the provisions relating to the National Advisory Council, to local committees and sub-committees and to the grants committee, the Education Act, 1944, replaces the provisions relating to local education authorities. § 53 of that Act converts

(*s*) Physical Training and Recreation Act, 1937, § 3.

(*t*) *Ibid.*, § 1.

(*v*) Education Act, 1944, § 53 (4).

(*w*) Physical Training and Recreation Act, 1937, § 4.

(*y*) Physical Training and Recreation Act, 1937, § 4.

(*u*) *Ibid.*, § 2.

(*x*) §§ 221-229.

(*z*) *Ibid.*, § 6.

the former power of such authorities into a duty to secure that the facilities for primary, secondary and further education provided for their area include adequate facilities for recreation and physical training. Specific power is given, with the approval of the Minister, to establish, maintain and manage, or to assist in the establishment, maintenance and management, of camps, holiday classes, playing fields, play centres and other places (including playgrounds, gymnasiums, and swimming baths not appropriated to any school or college), at which facilities for recreation and for such training are available for persons for whom the authority provides educational facilities. Local education authorities may, in addition, organise games, expeditions and other activities for such persons, and may defray or contribute towards the expenses (*a*). In exercising these functions, regard is to be had, in particular, to the expediency of co-operating with any voluntary societies or bodies whose objects include the provision of facilities or the organisation of activities of a similar character (*b*).

Regulations may be made by the Minister of Education empowering local education authorities to provide for pupils attending any school or county college maintained by them such articles of clothing as the regulations may prescribe, suitable for the physical training provided at the school or college (*c*).

(*a*) § 53 (1).

(*b*) § 53 (2).

(*c*) § 53 (3).

CHAPTER XXVIII

TRADING UNDERTAKINGS

Usual Trading Services.—The usual trading services which are supplied by some, though by no means all, local authorities are markets (subject to an observation made below), water, gas, electricity and transport. In its infancy is the municipal aerodrome, though the national policy for the post-war development of civil aviation may result in the removal of civil aerodromes from municipal control. There is no rule as to which of these services an authority should own. Naturally municipalities on the whole administer these services more frequently than other authorities, but some municipal corporations own all these services, others own all except water, or gas, or transport. The question has been decided by local considerations. Services not owned by the local authority are usually supplied by a statutory company.

It is proposed to treat each of these services in turn, after the following general observations.

Markets.—A power to trade in commodities for purposes of gain has not been considered by the Legislature proper to be conferred upon local authorities, and in recent times, at any rate, every application for the extension of municipal trading powers has been hotly contested by trade interests. Powers to own markets and to exercise market rights have been granted to a small number of boroughs under charters of considerable antiquity, but markets and market rights are not objects of trading for their owners, to whom their value lies rather in the right to take tolls which is associated with them. Markets are included in this chapter on the ground of convenience, and because they are often a source of profit to the local authorities

by whom they are owned. Apart from any question of profit, it is often a convenience to the public that the market should be owned by the local authority.

Water and Gas.—Powers to supply water to a borough or urban district have often been obtained by means of a private Act, either by the local authority or an incorporated company. In the case of water the purpose of the promoters would appeal to the public less as the establishment of a trading undertaking than as the supply of a commodity essential to life. Similarly, the public supply of gas was originally in the nature of an extension of the primitive street-lighting arrangements of earlier times: lighting and watching had been considered as a single service. Consequently, the supply of water and gas was associated in the minds of the public with local government and not with trading.

When at a later date the usefulness of these publicly administered services had been realised, it was easier to meet the attacks delivered when powers for local authorities to run tramways and to supply electrical energy were sought. The theory that public utilities in the nature of monopolies might properly be controlled by the public had been tested and approved.

Ownership of Trading Services by Companies.—It is also noteworthy that, though trading services are sometimes owned by local authorities, the same services in other districts are worked and owned by companies established under special Acts or Orders. In the latter case, the position of the local authority in relation to the service supplied has usually been considered when powers are granted. The company's statute often contains provisions conferring upon the local authority the power to purchase the company's undertaking (a) on specified terms, and also requiring the reasonable consent of the local authority to be obtained before certain privileges (b) are exercised. The company's statutory powers of supply, in

(a) Or the part of it within the local authority's area.

(b) *E.g.*, the erection of poles upon the highway, or the crossing of the highway by wires.

other words, are subject to the reasonable control of the local authority so far as they interfere with the rights or convenience of the public.

Rights and Obligations of Owners of Utilities.—In the special legislation conferring rights to supply utilities such as water, gas, electricity or transport, it is usual to give the promoters an exclusive right of supply within a defined area. These privileges are accompanied by statutory obligations, the grounds for which are readily understood.

The law does not prohibit a landowner from establishing gas, water or electricity works on his own land: to express the idea differently, there is at common law no monopoly in these services. He may indeed supply his neighbours and servants with one or more of these utility services, without risking interference from the law by so doing, and this in fact occurs in many parts of the country. The legal position is changed when the owner of the utility requires to use the public roads or streets for the extension of his services. In such a case the law at once steps in and the appropriate statutory limitations come into operation. The reason is that the interference with the structure of a highway, as by erecting thereon poles carrying wires over it, or by placing pipes under its surface, is unauthorised apart from statutory powers, and inasmuch as every utility undertaking is unable to carry on its business without making special use of the highways, in excess of the user which is common to all the King's subjects, the aid of Parliament has to be invoked, and accordingly, while granting the permission so asked for, the Legislature lays the undertaker under strict obligations, not solely as to the extent of his permissible interference with the highway, but also as to the conduct of his business and the service he supplies. And on consideration it will seem that this is not an arbitrary procedure. Roads were originally laid out for the purpose of passage for man and beast and vehicles of various kinds. The time came when it was found expedient, and indeed necessary, to allow sewers and drainage pipes to be placed underneath the roads. But the law was careful to pro-

vide the terms and conditions under which this facility might be granted. The rights of the travelling public must be respected ; the full width of the roadway must not be taken up at one time so as to block traffic, the necessary interference must be limited as much as possible in point of time, and the surface must be restored and made good immediately after the pipes and sewers have been laid down. This principle was extended when the purveyors of utilities needed facilities for placing their works over or under the highways. It was right that these facilities should be granted to them, for otherwise their businesses could not be carried on, and Parliament accordingly authorised some interference with the highway. But in their case, not only were they put under strict regulation as to the times and manner of authorised interference with the highway and as to its restoration, but, being undertakers of monopoly services for the supply of which a price was charged to consumers, the Legislature also placed upon them the burden of complying with various obligations which were not connected with the use of highways, but were designed to safeguard the consumer against improper charges or unreasonable requirements on the part of the undertakers. It is recognised that as nearly as may be the consumer of a public utility service should be placed upon an equality with the supplier in the matter of bargaining. No such supplier can conduct an undertaking of magnitude without utilising the highway for its purposes, and the statutory obligations just referred to are the price he pays for this privilege. Later still there has developed a tendency to impose statutory duties upon undertakers although they have not been compelled to go to Parliament for special powers and so have never assumed the status of "statutory undertakers" (c).

Clauses Acts.—The machinery by which the statutory control of monopoly undertakings is effected is found in the undertakers' special Acts and the incorporation of the

appropriate Clauses Act (*d*). The Clauses Act usually does not apply unless it is definitely incorporated by an express provision in the special Act or provisional order or other statutory order. They are similar in structure, but having been passed at different times and affecting diverse undertakings, there are necessary variations. It is by means of the Clauses Act that the promoters are enabled to interfere with highways and are placed under the limitations already referred to. The advantage of the use, by incorporation with a special Act, of the Clauses Act is not merely that it considerably shortens the special Act—it also introduces a measure of uniformity in the use and control of a particular utility service throughout the country.

A.—MARKETS

History.—The ownership and control of markets has never been considered an essential part of local government services, and the only general power conferred on local authorities to acquire or establish markets is contained in the Food and Drugs Act, 1938 (*e*), and is even then only of a permissive character. Yet markets are of great antiquity and have been of no little value to the towns in which they have been established. They are mentioned in Domesday Book, and indeed the markets had begun

“long before the Conquest to be a force which was to give to the boroughs their most permanent characteristic. They were to be the centres of trade” (*f*).

A market was, and still is, a profitable franchise. Every week on a stated day the market brought together buyers and sellers of commodities of daily use and was of obvious benefit to the community, though the franchise did not necessarily or even

(*d*) Market and Fairs Clauses Act, 1847; Gasworks Clauses Acts, 1847 and 1871; Electric Lighting (Clauses) Act, 1899; Water Act, 1945 (replacing the Waterworks Clauses Acts, 1847 and 1863, and other statutory provisions).

(*e*) Replacing provisions previously contained in the Public Health Acts, 1875 and 1908.

(*f*) Maitland, *Domesday Book and Beyond*, p. 192.

usually belong to the townspeople. Normally it was vested in the great landowners, barons it might be, or bishops or abbots, who were able to keep the peace as the townspeople could not, and would naturally desire to retain the valuable market rights, particularly that of taking tolls, in their own hands.

“ Markets and fairs were matters neither of parish nor of county concern, but were under the control of the individual or corporate owners of franchises ” (g).

Franchise.—A franchise is the exclusive right within a defined area to exercise some privilege and can only be obtained by grant from the Crown or charter or, in modern times, by statute. Where the original grant cannot be traced and the market has been long in existence without challenge to the *de facto* owner's rights, the right is deemed to rest upon a lost grant.

Disturbance of Rights.—The exclusive nature of the right is apparent from a consideration of the question of disturbance of market rights. A market owner, who under legal powers has provided and maintains a market of adequate size and convenience, is entitled to have his rights protected against the setting up of any rival market within a distance usually reckoned as from six to seven miles from the market. He may forfeit his market rights by discontinuance of the market, but so long as he gives to the public the market facilities which the law requires him to provide, he is entitled to the protection of the law against disturbance of his franchise or statutory privilege. His remedy is by application to the courts for damages or more often for an injunction to restrain illegal interference with his market rights.

Duties of Owner of Market.—A market franchise is therefore a monopoly right within a defined area to hold a concourse of buyers and sellers. The owner's duty is to provide a market of adequate size so that the buyers and sellers

may find all the accommodation they reasonably require, and to afford access enabling the public to attend. For making this provision he is entitled to collect from persons trading in the market payments known as tolls, rents and stallages, though other expressions to the same effect are sometimes used. Tolls are exacted for the privilege of selling in the market place, while stallage is paid for the use of a particular place in the market. Yet, although the service rendered by the market owner is always accompanied by a right to collect tolls or other charges, it is singular that the two rights do not both arise from the same franchise. The right to toll is not incidental to a market franchise, but is an independent right, and is the subject-matter of a subsidiary franchise (*h*).

Fairs.—Closely akin to a market franchise is that of a fair. The grant of a market franchise does not carry the right to hold a fair: they are separate franchises but of equal dignity (*i*). A market is held on a specified day or days every week, and is principally used by local people, while a fair is usually held once a year and for a number of consecutive days, the times of which may not be varied by the owner of the fair at his will (*j*). The probability is that fairs attracted merchants and others from considerable distances and the articles offered for sale were of a much greater variety and attraction than those found at ordinary markets, though the legal distinction depends solely upon the frequency of holding the concourse of buyers and sellers. Contrary to what has been enacted with respect to markets, fairs were not included in the rights which might be established under the Public Health Acts, nor are they referred to in the Food and Drugs Act, 1938, which replaced the markets provisions of those Acts. Now that transport facilities are far greater than ever before and holidays are more numerous, the advantages which fairs formerly afforded for general trading and for bringing separated families and friends

(*h*) See *Duke of Newcastle v. Worksop Urban District Council* [1902] 2 Ch. 145; 33 Digest 540, 176.

(*i*) *Duke of Newcastle v. Worksop Urban District Council*, *supra*.

(*j*) *Ibid*.

together are of no present consequence. Fairs usually induce noise and nuisance to the neighbourhood and are becoming increasingly distasteful to large numbers of the population, and the Legislature has not thought it desirable to permit the establishment of new fairs under statutory powers. In fact, Parliament has by the Fairs Act, 1871, recognised that some fairs are unnecessary and injurious to the towns in which they are held, and has empowered the Home Secretary, upon representations made by the council of the borough or district (*k*) and with the previous consent of the owner of a fair or the tolls or dues payable in respect thereof, to order that the fair shall be abolished. By the Fairs Act, 1873, the Home Secretary may, upon representation made either by the council of the borough or district (*l*) or by the owner of a fair, alter or reduce in number the days for the holding of the fair.

Acquisition of Market Rights.—Many boroughs possess the market rights for their districts. Some were acquired by original grant (*m*) and others were bought from the lord or obtained by grant from the Crown during the Middle Ages. The greater number were obtained in modern times by purchase from previous owners, and in such cases the agreement for the purchase has as a rule been confirmed by, or incorporated in, a local Act. In any Act so obtained it is usual to include power to borrow the amount of the purchase money and in addition a fixed amount to be expended on the improvement and development of the market premises. The local Act also incorporates the Markets and Fairs Clauses Act, 1847, which, when so incorporated, gives additional powers, and in this way enables the authority to discharge effectively the powers and duties of a market authority. The Crown still has the power to create a new market so long as existing market rights are not interfered with, and of course Parliament may by statute confer market rights.

(*k*) Local Government Act, 1894, § 27.

(*m*) *E.g.*, Chesterfield in the year 1215.

(*l*) *Ibid.*

Statutory Markets.—The Food and Drugs Act, 1938, enables certain classes of local authorities either to purchase market rights and properties, or to establish new markets so long as existing market rights are not interfered with.

It should be noted at the outset, in referring to these powers given by the Food and Drugs Act, that the exercise of the powers of establishing and equipping a market is subject to an important condition that there shall not be caused thereby any interference with any rights, powers or privileges enjoyed within the district by any person without his consent. In other words, these powers are ineffective in districts in which a properly constituted market is in active being, except with the consent of the owner of the market undertaking (*n*).

Powers to set up and purchase Markets.—Power to establish markets and to purchase or lease existing market rights is conferred by § 44 of the Food and Drugs Act, 1938. Originally these powers were given only to urban authorities (*o*), but were extended to rural authorities by the Public Health Act, 1908 (*p*). Special procedure was formerly necessary before the establishment or purchase of a market could be effected. In the case of a borough council the consent of two-thirds of its number was requisite before the market might be provided. In the case of other urban authorities the consent of the owners and ratepayers of the district was required, and this had to be expressed by a resolution passed at a meeting of owners and ratepayers duly summoned and advertised, subject to a poll being requisite if demanded. There was no provision requiring the consent of the Minister of Health to be obtained before the resolution became effective, but, as in practically every case it was requisite to borrow money for the cost of establishing the market, the consent of the Minister was in effect necessary. Rural authorities could only exercise

(*n*) Since the coming into operation of the Food and Drugs Act, 1938, § 44, this exception no longer applies in favour of another neighbouring local authority which has established a market under the power conferred by the Public Health Acts or the Food and Drugs Act, 1938.

(*o*) Public Health Act, 1875, § 166.

(*p*) § 1.

these powers with the consent of the Minister of Health, but no meeting of owners and ratepayers was necessary in their case (*q*).

Under the Food and Drugs Act, 1938, this special procedure in the case of urban authorities is no longer necessary, but rural authorities still need to obtain the Minister's consent.

Extent of Powers under Food and Drugs Act.—The powers which may be exercised by a borough council or an urban or rural district council under § 44 of the Food and Drugs Act, 1938, include the provision of a market place and market house and conveniences and approaches, the purchase or lease (by agreement) of the whole or any part of an existing market undertaking within their district, and rights enjoyed by any person within their district in respect of a market and tolls.

Power is also given, by § 45, to the owner of a market undertaking, or of any market rights or tolls, to sell or lease it or them to a local authority, subject to all liabilities attaching thereto, and to compliance with special procedure in the case of a sale by a market company.

Special provisions are contained in the Act relating to the appointment of market days and hours (*r*), the fixing of stallages, tolls and charges (*s*), the payment and recovery of stallages, etc. (*t*), and other matters. In particular there is an important provision imposing a liability to penalty upon every person, other than a licensed hawker or certificated pedlar, who sells or exposes for sale any tollable articles in any place within the district of the authority (*u*), except in his own dwelling-house or shop. These provisions also require the authority to provide weighing machines and weights for the market; and they enable the authority to make bye-laws for various purposes so that business may be facilitated and nuisances and obstructions prevented, and that the use of false or defective weighing machines and weights may be stopped (*v*).

(*q*) Public Health Act, 1908, § 1.

(*s*) § 47.

(*u*) § 50.

(*r*) § 46.

(*t*) §§ 48 and 49.

(*v*) §§ 51-56.

It will be seen, then, that the power to provide and carry on markets which is given by the Food and Drugs Act, while limited so as not to interfere with the rights of other market owners, is easy of operation and inexpensive. The purchase of an existing market involves the payment of purchase money, but otherwise does not entail an expensive procedure. It is also effective, for a statutory market is entitled to all the rights and protection necessary to enable it to be properly worked.

Reference may here be made to a practice in recent legislation of assuming to some extent a general control over specified trades and industries, an illustration of which is afforded by the Livestock Industry Act, 1937. This provides that markets for the sale of livestock may only be conducted on premises where such markets were lawfully held during the year ended the 30th November, 1936, or on premises approved by the Livestock Commission (*w*); and that the Commission may close markets for the sale of livestock subject to payment of compensation to persons injuriously affected thereby (*x*).

Slaughterhouses, etc.—Reference may here be made to ancillary powers also conferred by the Food and Drugs Act, 1938. § 60 authorises a local authority (*y*) to provide public slaughter-houses and to make bye-laws with respect to the management and charges for their use. The same Act permits a local authority, which has itself provided a slaughter-house, with the consent of the Minister to close private slaughter-houses subject to the payment of compensation, and to prevent new private slaughter-houses from being established in its district (*z*). The Livestock Industry Act, 1937, however, permits the Livestock Commission to set up experimental central slaughtering houses and ultimately to close others (*a*). Moreover, the Food and Drugs Act, 1938 (*b*), authorises a local authority, which has provided a slaughter-house or market, to provide a cold-air store or refrigerator subject to the consent of the Minister of Health. These provisions are obviously

(*w*) § 14.
(*z*) § 61.

(*x*) § 16.
(*a*) § 25.

(*y*) Defined in § 64 of the Act.
(*b*) § 62.

desirable from the point of view of public health, while markets, though originally established for purposes of trade, have shown increasingly in the process of time that they can be used for the purpose of effectively preventing the sale, or offer for sale, as food of any article which is unwholesome or otherwise unfit for human consumption.

Changes in methods of carrying on trade and in transport have affected the value and the use made of markets. Nevertheless they are still needed and are of value to the community, and modern opinion on the whole favours that they should be owned and controlled by the local authority rather than by a private owner.

Expenses.—Moneys raised for the purposes of public markets established or acquired under the Food and Drugs Act are charged upon the general rate. Profits are paid into and losses charged upon the general rate fund.

B.—WATER

Introduction.—An adequate supply of water, so essential to human life, is needed not only for drinking and personal cleanliness, but also for various sanitary purposes and for processes of trade and manufacture. Primarily, it is a public health service of first importance: to some industries it is vital, to others of importance, though the increasing use of electricity for industrial purposes is lessening the demand for water in some districts.

Supply in Urban Areas.—In large urban and crowded areas water is usually supplied to the public by a local authority or by an incorporated company armed with statutory powers. The supply is used for a great variety of purposes, and a charge is made for the water supplied—to the householder according to the annual value of his premises, to the manufacturers and the large consumers at a rate per thousand gallons consumed. Supplies for public baths, street watering and other public purposes are sometimes charged for by book entries, so that

the real cost of different services may be ascertained. For purposes of supply in urban areas, it has been found necessary to construct large impounding reservoirs, which store water obtained either by gravitation from high level lands or from underground sources by means of pumping works, the supply to consumers being afforded by means of mains and pipes. The requisite powers to construct the works and manage the undertaking have usually been obtained by local Acts, with which were incorporated the Waterworks Clauses Acts, 1847 and 1863. Under the Gas and Waterworks Facilities Acts, 1870 and 1873, companies (but not local authorities) could obtain powers of supply by provisional orders incorporating the Waterworks Clauses Acts and made by the Minister of Health.

The need for periodical inspection of large reservoirs in the interests of safety is recognised in the provisions of the Reservoirs (Safety Provisions) Act, 1930, which places upon the undertakers the obligation at ten-yearly intervals to have inspections and reports made by competent engineers of reservoirs of over five million gallons capacity situated above the natural level of the adjoining land.

New Water Supply Code.—On October 1st, 1945, the whole of the code previously contained in the Waterworks Clauses Acts, etc., was repealed and replaced by the Water Act, 1945. This Act contains a completely new waterworks code and imposes important duties upon the Minister of Health, and upon local authorities and statutory water undertakers. In the first place, the Minister is required (c) “to promote the conservation and proper use of water resources and the provision of water supplies in England and Wales and to secure the effective execution by water undertakers, under his control and direction, of a national policy relating to water.” The Minister is also to appoint a Central Water Advisory Committee to advise him in the performance of his functions (d), and may constitute and prescribe the duties of Joint Advisory Water Com-

mittees for any area in England and Wales (e). Local authorities and statutory water undertakers may also be required to carry out surveys of consumption and demand and of water resources and to furnish records and information to the Minister (f).

Local Organisation of Water Supplies.—Under the Water Act, 1945, the Minister may now constitute joint water boards without the consent of the local authorities concerned, and may also provide by order for the combination of water undertakers and for the transfer of undertakings either by agreement or compulsorily (g), and may similarly vary the limits of supply of an undertaking (h), or require an undertaker to give a supply of water in bulk to another undertaking (i). He is also given very wide default powers (j).

Part III of the Act (k) contains a number of detailed provisions for securing the conservation and protection of water resources.

In the past it has been the practice for many local authorities, in addition to incorporated water supply companies, to obtain their powers by means of a local Act of Parliament. Part IV of the Water Act, 1945, provides a simpler code by which any persons who are or wish to become statutory water undertakers (as defined in § 59 of the Act) may obtain powers for that purpose by means of an order (which in certain circumstances is provisional only until confirmed by Parliament), and such an order may incorporate any or all of the provisions of the new waterworks code contained in the Third Schedule to the Act.

Charges for Water.—In the urban areas, as a general rule, excellent supplies of pure and wholesome water are supplied at charges that are not unreasonable. In rural areas the question of securing an adequate supply of water of good quality is usually one of some difficulty. Water cannot be supplied from storage at remunerative charges, and reliance has had in the past to be placed upon supplies from wells

(e) §§ 3 and 4.

(h) § 10.

(i) § 12.

(f) §§ 5 and 6.

(j) § 13.

(g) §§ 8 and 9.

(k) §§ 14-22.

yielding water of indifferent quality and often containing impurities. The problem of water supply in large cities and many other urban areas is met by the services of an undertaking with large capital resources and ready means of obtaining payment by the use of its power to cut off supplies when the water rate is in arrear. The idea of a trading undertaking therefore predominates in large towns; but in the smaller urban areas and the rural areas water supply is almost entirely a public health question.

However, under the Rural Water Supplies and Sewerage Act, 1944, important new duties were imposed upon local authorities to provide a piped water supply to "every rural locality in their district in which there are houses and schools" and the Minister of Health was empowered to contribute towards the cost of providing a supply, or of improving existing supplies, in a rural locality (*l*), the county council also being required to contribute (*m*).

The object of this Act was to secure that a piped water supply should be made available in even the remote rural areas as well as the urban areas and, with the additional powers conferred by the Water Act, 1945, large-scale extensions of water supplies will doubtless take place within the next few years.

Supply under Public Health Act. — The Public Health Act, 1936, as extended by § 28 and other provisions of the Water Act, 1945, gives wide powers to both urban and rural authorities to provide water for their districts (*n*). It is the

(*l*) §§ 3 and 1 respectively. § 3 of the Act of 1944, and the Public Health Act, 1936, § III (which imposed general duties in connection with water supplies upon local authorities) are now replaced by § 28 of the Water Act, 1945, which substitutes a completely new section for § III of the Act of 1936.

(*m*) § 2.

(*n*) §§ III-142. Some of these provisions are, however, repealed by § 62 of the Fifth Schedule to the Water Act, 1945. It should be noted that a local authority may supply water under the Public Health Act, 1936, under a local Act or under the Water Act, 1945, but there is now a considerable overlapping of the various provisions, and it is unfortunate that the opportunity given by the modernisation of the waterworks code in the Water Act, 1945, could not have been taken of providing a single code which could then be applied to all local authorities and other undertakers providing a supply of water.

local authority's general duty to ascertain from time to time the sufficiency and wholesomeness of the water supplies within its district, and to provide a supply of wholesome water in pipes to every part of its district in which there are houses and schools, where practicable at a reasonable cost, and by some other method if a piped supply is impracticable (*o*). Moreover, the county council may contribute towards the expenses of a council of a county district in connection with water supply (*p*). To enable itself to provide a supply a local authority is armed with wide powers. The authority may construct or take on lease any waterworks or contract for a supply of water (*q*), and may give guarantees to persons undertaking to supply water (*r*).

The general power of local authorities to provide a water supply is supported by a number of detailed powers. Thus the local authority may, with the consent of the Minister, construct works for taking or intercepting water (*s*), and has similar rights as to laying and maintaining mains as are conferred upon it for constructing and maintaining sewers (*t*).

A large reservoir may not be constructed until after twenty-eight days' notice by public advertisement, and, in the event of objection, until the Minister, after the holding of a local inquiry, has approved the proposals (*u*).

Moreover, for the purpose of enabling local authorities to supply water under the Public Health Act, 1936, there were incorporated with the Act various of the provisions of the Waterworks Clauses Acts, 1847 and 1863, though for these provisions a number of provisions of the Water Act, 1945, have now been substituted (*v*).

A local authority which supplies water is under a duty to secure that the water is wholesome (*w*), and may supply water for other than domestic purposes (*x*).

(*o*) § 111 (as substituted by § 28 of the Water Act, 1945.

(*p*) § 307 (and see also the Rural Water Supplies and Sewerage Act, 1944, § 2).

(*q*) § 116.

(*r*) § 123.

(*s*) § 116.

(*t*) § 119.

(*v*) § 31 and the Fourth Schedule.

(*w*) § 115.

(*u*) § 118.

(*x*) § 112.

The charge for water supplied under the Public Health Act, 1936, is normally to be made by means of a water rate assessed on the net annual value of the premises, but agreements for supplying water by meter or otherwise may be entered into between the local authority and the person receiving the supply (*y*). In certain cases, however, where more than a purely domestic supply is required, the local authority may insist on the supply being paid for by measure (*z*), the meters being kept in order at the expense of the local authority (*a*).

Powers relating to water supply of a more obviously public health nature are also conferred on local authorities by the Public Health Act, 1936.

Public pumps, wells, etc., used for gratuitous supply vest in the local authority, who may also construct works for supplying water for the gratuitous use of the inhabitants desiring to take it for domestic purposes (*b*). Parish councils may also utilise wells, springs and streams for water supply (*c*). The local authority may also close sources of public supply vested in it when unnecessary or polluted (*d*), and may apply to a court of summary jurisdiction for an order directing the closing of a polluted source of supply not vested in the local authority (*e*).

A local authority may compel the provision of a satisfactory and sufficient supply of wholesome water for any new house by refusing to pass plans and by prohibiting occupation until its requirements are met (*f*).

In other cases the local authority may, with certain limitations and subject to an appeal to the Minister, compel the owner of a house, lacking a supply of wholesome water sufficient for the domestic purposes of its inmates, to provide a supply (*g*).

(*y*) § 126.

(*a*) § 134.

(*c*) § 125.

(*e*) § 140.

(*f*) § 137, as amended by § 29 of the Water Act, 1945.

(*g*) § 138, as amended by § 30 of the Water Act, 1945.

(*z*) § 127.

(*b*) § 124.

(*d*) § 124.

C.—GAS

History.—When the lighting of the streets of a parish became a practical question, it was usually undertaken by the parish vestry, and in early days was, one may suppose, discharged very inefficiently. Lighting and watching have always gone together: the street illuminant has always been the silent companion of the constable (*h*).

Local Lighting Acts.—As towns grew in size and population, and a more effective lighting service was needed, local Lighting Acts were passed imposing this duty upon commissioners, generally those who were also responsible for the paving, cleansing and sewerage of streets, while in some of the large towns gasworks were constructed and put into use under statutory powers (*i*). When gas came to be an effective street illuminant, an adoptive Act, the Lighting and Watching Act, 1833, was passed with the object of making possible the lighting of parishes in England and in Wales. The Act could be adopted by a two-thirds vote of the ratepayers of the parish, and was carried into effect by a body of elected "lighting and watching inspectors." These inspectors were empowered, in addition to the appointment of watchmen, to provide lamps and lamp-posts and to have the same lighted with gas, oil or otherwise.

Unit of Area.—It will be noted that the unit of area, as in so many other cases, was the civil parish. The Lighting and Watching Act, 1833, is unrepealed, though it has now been modified so that it is only applicable to rural parishes, where it may be adopted by the parish meeting, its administration being in the hands of the parish council (*j*). It is in the Public Health Act, 1875, that more modern powers are to be found, by which the parish, as a unit of area, and the inspectors, as a means of administration, are discarded as no longer adequate

(*h*) An illustration of this age-long association is that down to the present time many municipal corporations appoint the Watch Committee to take charge of street lighting.

(*i*) *E.g.*, Manchester, S. and B. Webb, *Statutory Authorities*, pp. 262–264.

(*j*) Public Health Act, 1875, § 163; Local Government Act, 1894, § 7; Local Government Act, 1933, 11th Schd.

to provide for the needs of the community. The normal area for purposes of administration now is the urban district, and the inspectors are superseded by the urban district council, already possessed of powers to which responsibility for the proper lighting of streets may properly be added. The Minister of Health is empowered by order to enable other districts to be made the subject of similar powers. In all such areas, whether urban or whether made the subject of an order, the Lighting and Watching Act, 1833, was superseded by the relative provisions of the Public Health Act, 1875; the inspectors ceased to act, and all lamps, fire engines and appliances theretofore vested in the inspectors were transferred to the authority having jurisdiction under the latter Act (*k*). Under the Road Traffic Act, 1934, § 23, the county council may light or contribute towards the expenses of lighting county roads, and under the Trunk Roads Act, 1936, § 6, the Minister of Transport may do the same as respects trunk roads.

Public Health Act Powers.—The new powers conferred by that Act enabled the local authority :

(1) to contract for the supply of gas or other means of lighting the streets, markets and public buildings in its district, and to provide necessary lamps and apparatus,

(2) itself to supply gas for public and private purposes when there was no other authority or person having statutory powers to supply gas in the district, and to obtain a provisional order for that purpose, and

(3) to purchase, by agreement, the undertaking of a gas company operating in its district.

These powers, it will be seen, are adequate for ordinary purposes and can be obtained without costly preliminary proceedings. By provisional order under the Gas and Water Works Facilities Act, 1870, or by special order made by the Board of Trade and confirmed by resolutions of each House of Parliament under the Gas Regulation Act, 1920, § 10, the urban authority may be empowered to supply gas for

(*k*) Public Health Act, 1875, §§ 161 to 163.

the whole or any part of its district. In this way it is possible to exercise the powers of the Gasworks Clauses Acts, 1847 and 1871, which, while conferring powers, impose various obligations on the undertakers (*l*) not operative in a district except when incorporated in a special Act or order, and moreover authorise the breaking up of streets subject to reinstatement without delay. They also contain provisions for the benefit of gas consumers. For instance, undertakers are put under obligation upon request to supply gas for premises situate within twenty-five yards from any of their mains, and also to lay pipes beyond that distance when so required upon being recouped the cost. On the other hand, the undertakers may call upon any owner or occupier of premises requiring a supply of gas to enter into a written contract to continue to pay for a period of at least two years an amount not less than twenty per cent. on the outlay incurred by the undertakers in providing any pipes for the purpose of such supply (*m*).

The powers given by the foregoing sections of the Public Health Act, 1875 (other than the obtaining of a provisional order or the purchase of an undertaking), may be exercised without the approval of the Minister of Health, but, inasmuch as the works occasioned by the exercise of those powers can usually only be provided out of loan, the borrowing of which must first be sanctioned by the Minister, the practical result is that the Minister's approval is in fact necessary before the works are commenced.

Local Acts.—As a final note on this subject it may be added that the larger local authorities usually carry on their gas undertakings under powers contained in local Acts. It is in these larger undertakings that the trading aspect of the supply is best exemplified, for the commercial use of gas for heating and power purposes has enormously increased. In scattered areas a greater relative importance of the service to the community is afforded by the lighting of streets and public places.

(*l*) See above, p. 742, as to the Clauses Acts.

(*m*) Gasworks Clauses Act, 1871, § 11.

D.—TRANSPORT

Introduction.—After being a source of considerable profit for at least thirty years tramways have, except in congested areas, been largely superseded by other vehicles, and have in many cases become unremunerative, with the result that tramways constructed under statutory powers by local authorities and companies have often been dismantled and abandoned.

Contrast with Railways.—The Tramways Act, 1870, conferred a singular right to use the highway. Legislation relating to public water and gas services had authorised the disturbance of the surface of the highway to enable water and gas mains and pipes to be laid under the surface, but had not given any right permanently to use the surface. The right to open up the surface was accompanied by an obligation forthwith to make it good as soon as the pipes and mains had been laid as authorised by statute. No power to use the central surface of the highway permanently with substantial interference with the rights of the travelling public had been granted by previous statutes. When railways were promoted in the early period of the nineteenth century, it was the policy of the State to prohibit the promoters from using the highways, and they were consequently compelled to acquire private lands for the purpose of constructing their own systems. Further, wherever practicable at not unreasonable expense, railway companies were required to carry their lines over or under the highways so as not to interfere with the ordinary traffic on the roads. In country districts where highway traffic was small, power to cross the highways on the level was frequently given, the railway companies being put under strict obligation to provide and control gates across the highways, and only to close them when ordinary traffic could not cross the railway line without risk of injury.

Tramways Act, 1870.—The stringency of this policy was relaxed in the case of tramways when the Tramways Act of

1870 was passed, partly on the ground that tramway traffic was not likely to be run at excessive speed—as a fact, the first tramways under the Act were horse-drawn—and partly because the use of the highway was more convenient to prospective tramway passengers. The question of the comparatively great cost of acquiring lands for running tramways wholly away from the highways was also a material consideration when the new policy was determined upon. The Act does not of itself confer powers—it is in the nature of a Clauses Act, and can only be put into operation by a provisional order or Act directly incorporating its provisions. It was therefore provided (*n*) that powers to construct tramways might be conferred by provisional order made by the Board of Trade (now the Minister of Transport (*o*)), and any such order might be obtained either by the local authority, or by persons or companies with the consent of the local authority or of the road authority, when the district was in a highway district formed under the provisions of the Highway Acts. Tramways in general were to be constructed and maintained in the middle of the road and were to have a minimum distance between the outside edge of the footpath on either side of the road and the nearest rail of the tramway (*p*). The provisional order was to specify the nature of the traffic for which the tramway was to be used, and the tolls and charges (now generally designated “fares”) to be made by the promoters (*q*). A local authority which had completed a tramway under a provisional order was enabled, with the approval of the Board of Trade, to lease to any person or company for a period not exceeding twenty-one years the right to use the tramway and take fares or tolls (*r*). The promoters were authorised to break up streets for the purpose of laying down their tramways and were required to make good the surface after the completion of the work (*s*). They were to keep in repair so much of the road as lay between the outer rails of the tramway and eighteen

(*n*) Tramways Act, 1870, § 4.

(*o*) Ministry of Transport Act, 1919, and S. R. & O., 1946, No. 375.

(*p*) Tramways Act, 1870, § 9. (*q*) *Ibid.*, § 10. (*r*) *Ibid.*, § 19.

(*s*) *Ibid.*, §§ 26 and 27.

inches beyond the rails on each side of the tramway. If they should abandon the undertaking and take up the tramway, they were required forthwith to fill in the ground and make good the surface (*t*).

Under the powers of the Act, when incorporated with the relative provisional order, tramways were constructed by local authorities in many cities and towns, and the right to lease them to companies was widely used, the term of the lease being usually twenty-one years. Before the end of the first period difficulties had arisen in many cases between the local authority and the tramway company as to the extent to which the repair of the highway should be paid for by the company, and as to fares and other matters. There had also been a change of outlook with respect to the public ownership of tramway undertakings, and many corporations obtained powers by Act or provisional order to run their tramway systems themselves. Also in those cases in which the undertakers had been at the cost of providing the track and running plant and buildings for use in connection with the undertaking, the local authority was empowered to purchase the undertaking from the tramway company at the end of twenty-one years, and in this connection the correct interpretation of § 43 of the Tramways Act, 1870, had to be ascertained. This section provided that the acquisition of the tramways undertaking by the local authority should be effected upon terms that the purchaser should pay

“the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking ”

within the district. In many cases the parties could not agree as to the interpretation of this provision, the companies contending that they were entitled to be bought out on the basis of the rental value of the undertaking, while the purchasing authorities claimed that they were not liable to pay for more than the actual value of the materials etc. *in situ*. It was

decided (*u*) that the value of the tramway to be acquired was the cost of construction less depreciation.

The usual practice in establishing a tramway system was that the local authority paid the expenses of obtaining the requisite provisional order, while the lines were constructed and running plant supplied by the lessees. The Tramways Act, 1870 (*v*), authorised the expenses incurred by the local authority to be paid out of the local rate. It was also authorised on the security of the local rate to borrow moneys not exceeding an amount sanctioned by the Board of Trade, and repayable within such period as the Board of Trade might determine, and on the purchase of a tramway undertaking it was authorised to borrow on the security of the same rate. This rate in the City of London was the consolidated sewers rate, in boroughs the borough fund or borough rate, and in the case of local boards the general district rate, and in other places the poor rate, now universally the general rate.

Powers to run Omnibuses.—When the omnibus became a serious rival of the tramcar, many of the larger borough councils obtained power by local Acts to run omnibus services in conjunction with their tramway systems. This procedure was necessary, inasmuch as it had been held in the House of Lords in 1902 (*w*) that a statutory power to provide and operate a tramway service did not extend to cover the provision of an omnibus service. Now, however, §§ 101 to 104 of the Road Traffic Act, 1930, confer general powers to acquire and run omnibuses upon any county borough council or county district council which is operating a tramway, light railway, trolley vehicle, or omnibus undertaking; but this power can only be exercised with the consent of the Traffic Commissioners (*x*) of the area in question.

(*u*) *Edinburgh Street Tramways Co. v. Edinburgh Corporation* [1894] A.C. 456; 43 Digest 354, 113; *London Street Tramways Co. v. London County Council* [1894] A.C. 489; 43 Digest 355, 115.

(*v*) § 20.

(*w*) *London County Council v. A.-G.* [1902] A.C. 165; 33 Digest 109, 735.

(*x*) The Traffic Commissioners have, during the War, been replaced by Regional Transport Commissioners.

Light Railways.—By the Light Railways Act, 1896, an attempt was made to facilitate the construction and working of light railways, a term not defined in the Act. When the Act came to be applied it was found that the light railways were rather in the nature of tramways than of railways, and this might have been anticipated, seeing that the evident purpose of the Act was to enable light railways to be constructed in rural districts and for the benefit of agriculture, fishing and other definite industries. For such purposes the Treasury was authorised to make advances towards the cost of schemes.

The construction of light railways was less costly than tramways, and the obligations placed on the promoters were less burdensome than those to which promoters of tramways were liable, and as a fact in some cases tramways were constructed under the powers of the Light Railways Act. Applications for power to construct light railways might be made by councils of counties, boroughs or districts, as well as by other bodies or persons, to Light Railway Commissioners, appointed under the Act and authorised to issue the requisite order. These councils might also make advances to light railway companies, either by way of loan or by taking part of the share capital of the companies. Any expenses incurred under the Act were to be charged in the case of a county council as general expenses, in the case of a borough council to be paid out of the borough fund or rate, and in the case of other district councils to be charged as general expenses under the Public Health Acts.

In 1912 an amending Act was passed which provided that the power of the Light Railway Commissioners under the principal Act should continue for five years. Their powers were not renewed after the War of 1914–18, but were transferred to the Minister of Transport (y).

E.—ELECTRIC SUPPLY

Early Policy as to Electric Lighting.—When it was first realised during the last quarter of the nineteenth century

(y) Railways Act, 1921, § 68.

that electricity could be applied with profit to the service of the public, it was imagined that its effective use would be for the purposes of lighting, either of streets and public buildings, or private houses. The Electric Lighting Act, 1882, therefore, correctly embodied that opinion, both in its name and in its structure, and the subsequent discovery that the principal use of electricity is its adaptation for manufacturing and industrial purposes has necessitated the reconsideration of the subject from a different standpoint. The Act contemplated that electricity would be generated and distributed in comparatively small areas ; it was thought to be a question of purely local concern. Recent legislation, culminating so far in the Electricity (Supply) Act, 1926, has ensured the linking up under national supervision of huge generating stations situate at strategic points all over the country, and constituting the so-called " grid " ; we have in effect generation on national lines, while distribution remains local. The lack of foresight in 1882, which was unavoidable in the absence of scientific knowledge since made available, led to errors both in respect of areas of supply and in the constitution of statutory undertakers, and seriously checked the development of electricity for many years.

Changes of Policy.—Attempts were later made by legislation to cheapen and extend the production of electricity on regional lines, but largely through the contentions of competing interests they were only partially successful, and the Act of 1926 gave expression to the wider outlook that the solution of the problem could only be reached on lines of national policy.

Electric Lighting Act, 1882.—The Act of 1882 authorised the Board of Trade (now the Minister of Transport (z)) to confer powers to supply electricity for public or private purposes in any area either upon a local authority or upon any company or person. For this purpose the Board might grant

(z) Electricity (Supply) Act, 1919, § 39.

a licence to supply electricity in a specified area, but this procedure, though unrepealed, has not been put into operation for many years, and in existing circumstances is not likely ever to be resorted to. Before a licence could be granted the consent of the local authority of the area had to be obtained, the term of the licence could not exceed seven years and the Board might impose various terms and regulations in the licence (a). The Act also enabled the Board of Trade by provisional order to authorise any local authority, company or person to supply electricity within any area, such provisional order requiring confirmation by Act of Parliament, and this procedure was found preferable, except in the case of a very small undertaking (b). The grant was subject to such regulations and conditions as the Board of Trade might impose, to secure a regular and sufficient supply of electricity, the safety of the public from personal injury or from fire or otherwise, the limitation of prices to be charged, inspection and inquiry by the Board of Trade and the local authority, and the enforcement of the due performance by the undertakers of the duties imposed upon them in regard to the supply (c). The local authority was authorised, if it were the undertaker, to defray the expenses of the undertaking out of the local rate.

Powers of breaking up streets for the purpose of laying pipes and with respect to waste or misuse of current, or injury to the pipes and other works, were conferred by means of the incorporation of various provisions of the Gasworks Clauses Acts, 1847 and 1871. In this way ample powers were afforded to enable a small undertaking to be effectively conducted.

Act of 1888.—The growing importance of the use of electric lighting for public purposes was made evident by the provisions of the Electric Lighting Act, 1888, which enacted that no provisional order authorising a supply of electricity by any undertakers in the district of any local authority should be

(a) Electric Lighting Act, 1882, § 3.
(c) *Ibid.*, § 6.

(b) *Ibid.*, § 4.

granted by the Board of Trade except with the consent of such local authority, subject to a right of appeal to the Board of Trade. The Act also gave power to a local authority to purchase so much of the undertaking as might be situate within its own area at the expiration of forty-two years from the conferring of the original powers on terms similar to "tramway terms" (d).

Act of 1899.—The need for a Clauses Act in relation to electricity was met by the passing of the Electric Lighting (Clauses) Act, 1899, which contained in a Schedule various detailed requirements such as are usually contained in Clauses Acts, and which are brought into operation in a similar way.

Committee of 1899.—The year 1899 was also of importance in regard to electricity by reason of the issue of the report of the first of a number of Committees which have considered the means of aiding the development of electric supply. This Committee, presided over by Lord Cross, reported that conditions had changed since the existing areas of supply had been settled and advised that larger areas were desirable. At the same time power companies were being established over large areas, each company usually taking a county as the unit. The company obtained a special Act defining its powers and limiting its area. The common form of Act usually employed gave the company power to supply current in bulk to local authorities and other undertakers, and to supply direct for manufacturing and other trade purposes, but forbade it to supply direct to consumers for lighting and domestic purposes. This development marked a distinction between the generation and the distribution of electricity.

Since that time the generation of electricity has tended to pass into the control of large undertakers. A local authority has often found it of advantage to purchase in bulk from a power company on agreed terms and to distribute in detail to its ratepayers.

Act of 1909.—The Electric Lighting Act, 1909, while conferring new powers upon undertakers, also enlarged the powers of the Board of Trade, whose consent was to be obtained before an undertaker might erect a generating station. The Board could also by provisional order authorise the compulsory purchase of land by an electricity undertaking. The time had come when the limits of the area of supply were preventing the due extension of an undertaking, and the Board of Trade was authorised to consent to a supply being afforded outside the area of supply. These provisions showed how impossible it was to confine the growing usefulness of electricity to separate local government areas. The Board of Trade was also authorised to permit any local authority or company or person to supply electricity in bulk.

Act of 1919.—The War of 1914–18 demonstrated that the provision of electricity on a large scale is essential in times of emergency, and that the system upon which its production was then based was wasteful and expensive. In 1918 the Coal Conservation Committee, with Lord Haldane as its Chairman, recommended that for the purpose of co-ordinating the supply of electricity the country should be divided into large districts ; while Sir Archibald Williamson's Committee in 1919 recommended that the generation of electricity should be concentrated in units of large districts, in each of which a district board should be formed for the purpose of acquiring and working all existing generating stations. The Government realised the urgency of the problem, and without avoidable delay the Electricity (Supply) Act, 1919, was passed (*e*). The Act had two main purposes—to appoint a body of experts as Commissioners to supervise the supply of electricity, and to make provision through the Commissioners for the co-ordination of generation in large areas, by merging authorised undertakers, whether local authorities or companies, into joint electricity authorities. The Act accordingly established a body called

(*e*) It will be noted as significant that "Electric Lighting" was no longer retained in the title of the Electricity Acts.

the Electricity Commissioners, whose duties were to be the promotion, regulation and supervision of the supply of electricity, while the powers of the Board of Trade in relation to electricity were transferred under the Act to the Minister of Transport. The Minister was empowered to exercise through the Electricity Commissioners any of his powers and duties under the Electric Lighting Acts, but the Commissioners were otherwise to be an independent body. For the purpose of reorganising the supply of electricity the Commissioners were authorised to define separate electricity districts which would be conducive to the efficiency and economy of the supply of electricity and to convenience of administration. For the purpose of considering the organisation for the supply of electricity in a district so defined, the Commissioners were required to give notices to undertakers, local authorities and others, and to hold a local inquiry. Any bodies or persons interested might submit a scheme for effecting such reorganisation within an electricity district, and, if thought desirable, for the formation of a joint electricity authority representative of the undertakers and other interests in the district. Effect was to be given to such schemes by order of the Commissioners confirmed by the Minister and approved by resolution of each House. Every joint electricity authority when constituted was empowered to carry out the scheme under which it was set up. The Act contained various amendments of the law, of which it may be mentioned that the consent of the Minister to the carrying of any electricity line above ground should render the consent of the local authority unnecessary, though the Minister before giving his consent was to give the local authority an opportunity of being heard.

The accounts of the Commissioners were required to be submitted to the Minister. The Commissioners were not constituted a department of the Ministry, but they were not to be an independent body in every respect.

The Act of 1919 was not entirely successful. The Electricity Commissioners appointed under its provisions found it impossible to complete the formation of the joint electricity

authorities which they recommended should be set up, and very few of such authorities have been established. To some extent this was due to the extreme unwillingness of many undertakers to identify their undertakings with joint electricity authorities, and also to the defective powers of the Act. There was also a growing opinion that the problem would not ultimately be settled by the system of joint electricity authorities (f).

Act of 1922.—An attempt was made by Parliament in 1922 to complete the Act of 1919, and by the Electricity (Supply) Act, 1922, borrowing powers were conferred upon joint electricity authorities, subject to the consent of the Electricity Commissioners and subject to regulations made by the Minister of Transport with the approval of the Treasury. The Electricity Commissioners were authorised, subject to certain consents which proved difficult to obtain, to exclude from the area of supply of any power company certain parts of that area, and undertakers were authorised to give financial assistance to joint electricity authorities and to lease undertakings to them. The powers of the Act were generally directed to the extension of the effectiveness of joint electricity authorities by giving them more than merely supervisory powers. They do not appear to have made undertakers any more willing to unite with joint electricity authorities.

Act of 1926.—The Government were not satisfied with the position in which the organisation of electricity supply was left, and a small Committee, with Lord Weir as chairman, which had been asked to consider the question afresh, advised that regional development was not to be expected to solve the problem, and recommended that a single comprehensive scheme of co-ordination should be applied to the country as a whole. In accordance with the Committee's advice the Electricity (Supply) Act, 1926, sought to co-ordinate the generation of electricity over the whole country. The Electricity

(f) In some districts the distribution of electricity is still effected by joint electricity authorities.

Commissioners were continued in existence, and their duties were not affected except in one important respect. They were called upon to prepare a scheme for the co-ordination of generation, which was to be submitted to a newly constituted Board, to be a corporate body with a common seal and power to hold land and borrow and to be called the Central Electricity Board (*g*). The Board was required to consider the scheme prepared by the Commissioners, and to effect a national scheme for the co-ordination of generation. At certain generating stations, called selected stations, electricity is to be generated by the owners in accordance with the directions of the Board, who are placed under the obligation to lay all inter-connecting mains to link up the selected stations with each other. With this interconnection effected the "grid" is complete. It is expected to give two advantages—it will cheapen production and it will procure a low selling charge all over the system. The undertakers owning selected stations sell to the Board all electricity generated at their stations, the Board paying therefor the cost of production, to be ascertained in accordance with certain rules laid down by the Act. The Board then re-sells all the electricity bought by it to the various distributing undertakers requiring it, it being thus intended that electricity shall be sold at the cheapest possible rate throughout the whole of the area of supply (*h*). In these arrangements, the owners of the selected stations, whether local authorities or companies, are to be treated alike. In their own areas local authority undertakers continue to be the distributors of electricity, and in this way local control can be usefully exercised. Extensions of mains to new districts, varying terms of charge according to periods and extent of supply required, and supplies to public institutions and services (*i*) are questions in which the local authority can

(*g*) Electricity (Supply) Act, 1926, §§ 1 to 4.

(*h*) By the Electricity (Supply) Act, 1935, the Board may, with the consent of the Electricity Commissioners, enter into agreements for the supply of electricity to or by the Board with the owners of generating stations not being selected stations.

(*i*) *E.g.*, tramways.

rightfully serve the interests of the public. The large municipal undertakings continue to own and work their generating stations, which, however, must be operated in accordance with the directions of the Central Electricity Board.

F.—AERODROMES

Act of 1920.—The advances made in aerial navigation during the War of 1914–18 made evident the possibilities of its further development for civil purposes, and the desirability of powers being granted for those purposes was taken into consideration soon after the termination of hostilities. By the Air Navigation Acts, 1920 and 1936, extensive powers for the furtherance of flying were conferred on the Air Council, which was also empowered to establish flying grounds or aerodromes. Permissive powers to establish and maintain aerodromes, but not to conduct the business of air navigation, are conferred (subject to the consent of the Air Council) on various classes of local authorities—the City of London Corporation, metropolitan borough councils and the councils of counties, county boroughs and urban districts, who are authorised to charge expenses upon their usual rating resources. Ancillary powers are also given, including those for the provision and maintenance of roads and approaches, buildings and other accommodation and apparatus and equipment for the aerodrome. The specified authorities may by agreement or compulsorily (*j*) purchase or hire land, either within or without their areas. They may also carry on any business ancillary to the carrying on of the aerodrome which the Secretary of State for Air considers necessary or expedient and empowers them by order to carry on (*k*).

The development of civil aviation was not very rapid during the years prior to the outbreak of war in 1939, and while some authorities established aerodromes under the provisions of the Act, they were not generally remunerative.

(*j*) Air Navigation Act, 1936, § 9.

(*k*) *Ibid.*, § 12.

It appears that the post-war development of civil aviation is likely to be much more of a national affair than before the war, and it seems certain that local authorities will have a smaller part to play than hitherto, though many authorities are showing a keen interest in the possibility of securing airport facilities in or near their areas.

CHAPTER XXIX

LICENSING

Purpose of Licensing.—The granting of licences as a means of regulating the conduct of particular trades or activities has long been resorted to in England, and because the grant of many licences is now a matter for local authorities, it may properly be considered in this book. This is not, however, the only justification for adopting such a course. One of the most important of licensing functions is that exercised by justices of the peace in respect of retail sellers of intoxicating liquors, and this matter deserves mention if only because it is one of the few remaining local government powers still possessed directly by the magistrates, who in the eighteenth century were practically the only local authorities throughout the country. It remains as a relic to remind us of the former power of the justices.

It is not proposed here to detail the many matters in respect of which local authorities are the licensing, and therefore, in varying degrees, the regulating authorities for their areas. These licences differ considerably in importance. A few may be instanced, merely by way of illustrating the variety of duties of this nature imposed upon local authorities.

Local Taxation Licences.—The councils of counties and county boroughs grant the “local taxation licences” in respect of such matters as game, dogs and mechanically propelled vehicles (*a*), which were in part the source of those “assigned revenues” granted to these authorities in lieu of

(*a*) Licences in respect of male servants, armorial bearings, and the keeping of carriages and hackney carriages have recently been discontinued.

earlier grants in aid by the Local Government Act, 1888 (*b*). The only licences of this group which need be here considered are those relating to mechanically propelled vehicles. Licences to drive motor vehicles are now granted by the councils of counties and county boroughs under the provisions of the Road Traffic Act, 1930 (*c*), which has considerably increased the stringency of the law on the matter. But these licensing authorities have in general no discretion to refuse the issue of a licence on payment of the prescribed fee, if a properly qualified applicant makes the required declaration as to his physical fitness to drive a motor vehicle. Licences for mechanically propelled vehicles themselves are granted by the councils of counties and county boroughs under the provisions of the Roads Act, 1920 (*d*), and again the functions of these licensing authorities are practically confined to the ministerial duty of collecting appropriate duties imposed upon persons who wish to make use of the roads in vehicles falling within the classes specified in the relevant legislation.

More scope for the exercise of a discretion arises in the case of licences for public service and goods vehicles (*e*). Such vehicles must be licensed, so far as the local taxation licences are concerned, by the county or county borough councils in the ordinary way, but in addition thereto they, and in some cases their drivers and conductors, must be licensed for their special duties. The following paragraphs explain the general law affecting these licences, but it should be remembered that the Minister of Transport has, under Defence Regulations, temporarily but greatly varied the law for war-time purposes.

Traffic Commissioners.—For the purpose of granting licences for public service vehicles and goods vehicles the country is divided into traffic areas, each of considerable size (*f*). In each traffic area a body of three Traffic Com-

(*b*) § 20. See above, pp. 175 and 178.

(*c*) §§ 4 and 5.

(*d*) § 1.

(*e*) Road Traffic Act, 1930, § 61; Road and Rail Traffic Act, 1933, § 1.

(*f*) Road Traffic Act, 1930, § 62; Road and Rail Traffic Act, 1933, § 27 and 1st Schd.

missioners is appointed by the Minister of Transport (*g*). Though this step means the reversion to the idea of an *ad hoc* authority for the grant of licences in connection with these vehicles, care is taken to link up the new system with the existing local authorities. In normal times the chairman of each body of Traffic Commissioners is appointed by the Minister of Transport as a whole-time officer, and holds office during his Majesty's pleasure (*h*). The other two Commissioners in each area are, however, in effect the representatives of the local authorities, for, though appointed by the Minister for periods not exceeding three years, they must be chosen from two panels, one nominated by the county councils and the other by the councils of the county and non-county boroughs and urban districts situated in the traffic area (*i*).

Public Service Vehicle Licences.—In the case of passenger vehicles, licensing functions are performed by the three Traffic Commissioners sitting together. There are, however, three classes of licence to consider. First, no motor vehicle may be used as a public service vehicle (*j*) unless a public service vehicle licence is granted in respect of it by the Traffic Commissioners, who in general may not grant such a licence unless the vehicle is certified as fit (*k*). An appeal lies to the Minister of Transport from the Traffic Commissioners on their refusal to grant, or on their revocation or suspension of a public

(*g*) During the war the Traffic Commissioners have been replaced by Regional Transport Commissioners appointed by the Minister of Transport (who during that period has been known as the Minister of War Transport).

(*h*) Chairmen of Traffic Commissioners, etc. (Tenure of Office) Act, 1937.

(*i*) Road Traffic Act, 1930, § 63.

(*j*) Public service vehicles are motor vehicles used for carrying passengers for hire or reward, but, except where separate fares are charged, not vehicles adapted to carry less than eight passengers. They are divided into "stage carriages," or "express carriages," in which passengers are carried at separate fares, or "contract carriages," which are vehicles carrying passengers under a contract for the use of the vehicles as a whole or for a fixed agreed rate or sum: Road Traffic Act, 1930, §§ 61 and 121; Road Traffic Act, 1934, § 24. Thus ordinary taxicabs are excluded, being still licensed by borough or urban district councils as hackney carriages: Town Police Clauses Act, 1847, §§ 37 and 46; Public Health Act, 1875, §§ 171 and 316; Town Police Clauses Act, 1889, § 4.

(*k*) Road Traffic Act, 1930, §§ 67 to 71.

service vehicle licence (*l*). These licences remain in force for one year (*m*).

Drivers' and Conductors' Licences.—No person may act as a driver or conductor of a public service vehicle unless he is licensed by the Traffic Commissioners (*n*). If the Traffic Commissioners refuse to grant a driver's or conductor's licence, or suspend or revoke one already granted, the person aggrieved may require them to reconsider the matter and give him a personal hearing, and he may also appeal to a court of summary jurisdiction (*o*). These licences are also annual (*p*).

Road Service Licences.—Road service licences are more important, since without holding one no person may operate a road service and no vehicle may be used as a stage or express carriage (*q*). Thus, by their power to grant, refuse, suspend, or revoke road service licences (*r*) the Traffic Commissioners control and regulate the provision of both omnibus and long distance motor coach transport in their areas. Consequently, when dealing with road service licences the Commissioners are required to hold public sittings (*s*), and persons already providing transport facilities and local authorities are entitled to appear before them in addition to the applicant (*t*).

Road service licences are granted in respect of particular routes along which the applicant desires to provide a road service, and in considering an application the Traffic Commissioners are given a wide discretion and a power to attach conditions to any licence they may grant. They must have regard to the suitability of the proposed routes, the extent to which the proposed routes are already adequately served, the extent to which the proposed service is necessary or desirable in the public interest, and to

“the needs of the area as a whole in relation to traffic (including the provision of adequate, suitable and efficient services, the

(*l*) Road Traffic Act, 1930, § 81.

(*o*) *Ibid.*, § 82.

(*r*) *Ibid.*, §§ 72 to 74.

(*m*) *Ibid.*, § 80.

(*p*) *Ibid.*, § 80.

(*s*) *Ibid.*, § 64.

(*n*) *Ibid.*, § 77.

(*q*) *Ibid.*, § 72.

(*t*) *Ibid.*, § 72.

elimination of unnecessary services and the provision of unremunerative services), and the co-ordination of all forms of passenger transport, including transport by rail."

If they determine to grant a licence they may attach conditions for securing (*inter alia*) that the fares shall not be unreasonable, that, where desirable in the public interest, the fares shall be fixed so as to prevent wasteful competition with alternative forms of transport, and generally that the safety and convenience of the public shall be secured (*u*). Thus, though the Traffic Commissioners have no control over the transport facilities provided by railways, tramcars or trolley vehicles, their power of licensing motor vehicles plying as stage or express carriages enables them to co-ordinate the road services operated by omnibuses and long-distance motor coaches with the services of the former classes of passenger transport.

In connection with road service licences appeals lie to the Minister of War Transport. An applicant for such a licence may appeal against the refusal to grant it, or against the conditions imposed by the Commissioners. The holder of a road service licence may similarly appeal against the revocation or suspension of the licence, or against any variation of the conditions attached to it. But this is not all: the semi-judicial nature of the proceedings of Traffic Commissioners in hearing applications for road service licences permits, as has been seen, other interested parties to appear. Consequently, any such person or local authority, who has opposed the grant of a licence by the Commissioners, may appeal to the Minister against the licence being granted, or against any condition or the variation of the conditions attached to it (*v*).

Goods Vehicle Licences.—No person may, except under licence, use on a road a motor vehicle, constructed or adapted for the carriage of goods, either for hire or reward or in connection with any trade or business carried on by him (*w*).

(*u*) Road Traffic Act, 1930, § 72. A road service licence granted in one traffic area requires to be "backed" by the Traffic Commissioners of any other area through which the proposed route passes: *ibid.*, § 73.

(*v*) Road Traffic Act, 1930, § 81.

(*w*) Road and Rail Traffic Act, 1933, § 1.

Such licences are granted by the chairman of the Traffic Commissioners in each area or by his deputy (x), and he may also revoke or suspend them for breach of condition (y). Licences are of three classes. "A" licences are public carriers' licences authorising for a period of two years the use of a goods vehicle for hire or reward. "B" licences are limited carriers' licences and authorise for one year the use of a goods vehicle in connection with the licensee's trade or business, or, subject to conditions, for hire or reward. "C" licences are private carriers' licences and only authorise the use of a goods vehicle in connection with the licensee's own trade or business (z). The licensing authority has a discretion as to the grant of "A" and "B" licences and, in exercising that discretion, must regard primarily the interests of the public generally, including those of persons requiring as well as those providing transport facilities. In the case of "C" licences the licensing authority has in general no power to refuse an applicant except in certain cases of misconduct (a). All licences are subject to conditions, such as that the vehicle is maintained in proper condition, and in the case of "B" licences the licensing authority has a discretion to add further conditions designed to prevent uneconomic competition (b). Appeals from the licensing authority do not lie, as in the case of public service vehicle and road service licences, to the Minister of War Transport, but instead are determined by a special Appeal Tribunal. This consists of three members appointed by the Minister. The Chairman must be a person of legal experience and holds office during his Majesty's pleasure, while the other two members are appointed for periods of not less than three years (c).

Drivers of heavy goods vehicles, unless also licensed under the Road Traffic Act, 1930, to drive all types of single-deck public service vehicles, require licences. These are granted

(x) Road and Rail Traffic Act, 1933, § 4.

(y) *Ibid.*, § 13.

(a) *Ibid.*, § 7.

(c) *Ibid.*, § 15; Chairman of Traffic Commissioners, etc. (Tenure of Office) Act, 1937, § 1.

(z) *Ibid.*, §§ 2 and 3.

(b) *Ibid.*, § 8.

for periods of three years by the chairman of the Traffic Commissioners for the area, subject to an appeal to a court of summary jurisdiction (*d*).

Licences for Public Entertainments.—Different forms of public entertainments and the premises provided for them have at various times been subjected to regulation by the requirement of licensing. The grounds on which licensing has been required have varied from time to time. Thus stage plays, which must be licensed by the Lord Chamberlain (*e*), are regulated mainly in the interests of public morals. On the other hand, theatres, which outside the area of jurisdiction of the Lord Chamberlain (*f*) are licensed by the councils of counties and county boroughs (*g*), seem rather to have been brought under control with a view to ensuring order and decency among the persons frequenting them. Thirdly, the licensing of premises for cinematograph exhibitions, which is a matter for the county and county borough councils (*h*), was introduced to secure safety, as is shown both by the title to the Cinematograph Act, 1909, and by the fact that its provisions only apply to exhibitions “for the purposes of which inflammable films are used.” But here again a wider power of regulation has been obtained: the licences may be granted

“on such terms and conditions and under such restrictions as . . . the council may by the respective licences determine.”

The conditions must be reasonable, but may extend considerably beyond providing merely for the physical safety of the persons watching the performance. Thus, provided that the council granting the licence retains the right to give express

(*d*) Road Traffic Act, 1934, § 31.

(*e*) Theatres Act, 1843, § 12.

(*f*) That is, broadly, the Metropolis as far west as Westminster, New Windsor and Brighton: Theatres Act, 1843, § 3.

(*g*) Though they may delegate their powers to committees or to the justices in petty sessions: Theatres Act, 1843, § 5; Local Government Act, 1888, §§ 7, 28 and 34.

(*h*) Though they may delegate their powers to committees, district councils, or the justices in petty sessions: Cinematograph Act, 1909, §§ 2, 5 and 6. There is no power to issue provisional licences in respect of premises not yet built: *R. v. Barnstaple J.J.* *Ex parte Carder* [1938] 1 K.B. 385; [1937] 4 All E.R. 263; Digest Supp.

consent in a particular case, a condition may validly be attached preventing the exhibition of a film which has not been passed by the British Board of Film Censors (an unofficial body maintained by the trade) while any child under a specified age is present (*i*). In this or similar ways a control may be exercised over the actual films to be shown in any licensed cinema.

Registration.—In modern times a tendency has manifested itself in legislation to simplify the procedure of licensing and yet to obtain a degree of control over certain types of activity comparable to that formerly associated only with the grant of licences. This is procured by the requirement of registration with the local authority. In this way the persons conducting certain enterprises in a given area are readily discoverable, and an effective control can be obtained over them either by inspection or the exercise of bye-law powers. Illustrations of this practice are to be found in public health legislation, and the registration of common lodging-houses (*j*) and nursing homes (*k*) may be mentioned.

Licences for the Sale of Intoxicants.—The most complicated branch of the law relating to licensing is that in connection with the retail sale of intoxicating liquor. This is still in the hands of the justices of the peace, but its present position cannot be understood without some acquaintance with the history of the subject.

The sale of intoxicants and the keeping of inns, taverns and alehouses were not at Common Law subject to regulation, though such a house which became a nuisance could be proceeded against. In 1495 (*l*) a simpler remedy was found and the justices were permitted summarily to suppress unnecessary alehouses. Licences were soon introduced as a means of regulating retailers of beer, wine and spirits, and these powers

(*i*) *Mills v. London County Council* [1925] 1 K.B. 213; 42 Digest 922, 171.

(*j*) Public Health Act, 1936, §§ 235–248.

(*k*) *Ibid.*, §§ 187–195.

(*l*) Stat. 11 Hen. 7, c. 2.

were almost invariably conferred upon the justices. But the requirement of justices' licences grew piecemeal, each particular class of intoxicating drink being brought under control when the dangers of drunkenness and disorder were shown to have arisen from its increasing popularity. Side by side with these licensing laws there grew up, again in a piecemeal fashion, legislation designed to draw a revenue for the State from the retailers of intoxicants, and excise licences became necessary. We may briefly sketch the main outlines of this development.

History of Licensing.—In 1552 (*m*) alehouses were required to be licensed by the justices. Fees for these licences were first introduced in 1701 and made into an excise duty in 1808. In 1830 (*n*) an excise licence was made sufficient for houses selling beer, and it was not until 1869 (*o*) that the requirement of a justices' licence was reimposed on beerhouses and beershops.

In 1553 (*p*) licences were required for the retailers of wine. But the Crown still had a prerogative to grant wine licences, and this power was used, in effect, to create an alternative excise licence (*q*). This extraordinary power of granting wine licences was abolished in 1757 and a true excise licence substituted (*r*); but it was not until 1792 that these revenue licensees were required also to obtain a justices' licence (*s*). Retailers of made wines required a justices' licence in 1737 (*t*), and an excise licence in 1757 (*u*). Retailers of spirits, with some exceptions (*v*), were first required to be licensed by the justices in 1701 (*w*), and this was extended to all spirit retailers in 1729 (*x*). An excise was first imposed on retailers of spirits in the latter year (*y*).

(*m*) Stat. 5 & 6 Edw. 6, c. 25.*

(*o*) Wine and Beerhouse Act, 1869.

(*p*) Stat. 7 Edw. 6, c. 5.

(*q*) Stats. 21 Jac. 1, c. 3, § 12 (1623); 12 Car. 2, c. 25 (1660).

(*r*) Stat. 31 Geo. 2, c. 31.

(*s*) Stat. 32 Geo. 3, c. 59.

(*t*) Stat. 10 Geo. 2, c. 17.

(*u*) Stat. 31 Geo. 2, c. 31.

(*v*) Stat. 1 Anne, St. 2, c. 14 (1702).

(*w*) Stat. 12 & 13 Will. 3, c. 11, § 18.

(*x*) Stat. 2 Geo. 2, c. 28, § 10.

(*y*) Stat. 2 Geo. 2, c. 17.

Justices' Licences.—We are primarily concerned, not with excise licences, but with the licences granted by justices. The Act of 1552 (*z*), which gave them their first licensing duties, empowered any two justices to grant licences and required them to

“take Bond and Surety from Time to Time by Recognisance of such as shall be admitted and allowed hereafter to keep any common Alehouse or Tipplinghouse, as well for and against the using of unlawful Games, as also for the using and Maintenance of good Order and Rule to be had and used within the same, as by their Discretion shall be thought necessary and convenient.”

It was found, however, that these provisions were open to great abuse, since any two justices might grant a licence for a part of the county with which they were not familiar and without the requisite knowledge of the requirements of the district or of the character of the licensee. Consequently, in 1729 (*a*) it was enacted that thenceforth licences should only be granted at a general meeting of all the justices acting in the division in question, to be held annually in the first three weeks of September. This meant the introduction of a new special sessions, which soon acquired the name of “brewster sessions.”

From 1787 the justices up and down the country, inspired by a Royal Proclamation against Vice and Immorality, began to pursue a definite licensing policy, suppressing unnecessary public houses and only licensing such a number of houses as they considered to be required for the convenience of the inhabitants. This laudable object produced, however, a growing opposition as well from publicans, brewers and distillers as from politicians who, according to their political views, objected to the restriction of public houses either because of its disregard of the principle of freedom of trade or because of its injurious effect on the sale of agricultural products. Moreover, a policy of restriction in effect gave to those, who were successful in obtaining licences, a monopoly for the sale of intoxicants, and greatly increased the value of licensed premises, and in later times, when this policy is pursued under

(*z*) Stat. 5 & 6 Edw. 6, c. 25.

(*a*) Stat. 2 Geo. 2, c. 28, § 11.

direct statutory authority, the recognition that a licence is often more than a mere discretionary permission, in that it does create a monopoly value, has led in some part to the complexity of the modern law (*b*). Moreover, the limitation in the number of licensed premises led brewers to adopt the tied-house system under which publicans are bound by covenant to buy their commodities only from one brewer. The results of this policy were such that the Alehouse Act of 1828 considerably restricted the powers of the brewster sessions.

The Licensing (Consolidation) Act, 1910.—In more modern times the desirability of limiting the number of public houses has been recognised, and the present law on the subject is designed to prevent the number of such houses in any area from exceeding the effective requirements of the inhabitants, as well as to restrict the hours during which intoxicants may be sold. But it has frankly been recognised by the Legislature that the effect of this policy is to give a monopoly value to licensed premises, and the Licensing (Consolidation) Act, 1910, in consequence, is complicated by provisions designed to secure, on the one hand, that the public shall secure this value attaching to newly licensed premises, and, on the other hand, that compensation shall be paid for the loss of this value where old licensed premises lose their practical monopoly.

Excise Licences.—Excise licences are still required for the sale by retail of intoxicating liquors (*c*) ; but no excise licence may, in general, be granted unless the applicant is the holder of a justices' licence (*d*). In effect, therefore, a justices'

(*b*) See S. and B. Webb, *English Local Government, The Parish and the County*, Vol. I, pp. 585–589.

(*c*) Defined as "spirits, wine, beer, porter, cider, perry, and sweets, and any fermented, distilled, or spirituous liquor which cannot, according to any law for the time being in force, be legally sold without an excise licence" : Licensing (Consolidation) Act, 1910, § 110. But certain liquor of small alcoholic content is excepted from these provisions : Licensing Act, 1921, § 11.

(*d*) Licensing (Consolidation) Act, 1910, § 1. Certain exemptions exist : *e.g.*, no justices' licence is required for a retail dealer in spirits or wine holding an excise licence for consumption off the premises, provided that no other trade than the sale of intoxicating liquors and other drinks is

licence is a certificate without which no person may obtain an excise licence for the sale by retail of intoxicants.

Justices' Licences.—Justices' licences are of various kinds, some authorising the sale of liquor to be consumed on or off the premises and others being only off-licences. In addition early closing licences, requiring the licensee to close his house an hour earlier than is in general permitted (*e*), and six-day licences, preventing opening on Sundays (*f*), may be granted, the inducement to apply for such licences being that they entitle their holders to some remission in the excise duty payable (*g*).

Licensing Justices.—For licensing purposes the country is divided into "licensing districts," which are the petty sessional divisions of counties and the areas of boroughs with separate commissions of the peace (*h*). In each licensing district there is a body of "licensing justices." If the district is a petty sessional division of a county, then all the justices acting in and for the division are the licensing justices for that district. In a county borough a "licensing committee," consisting of not less than seven justices, is appointed annually by all the justices on the commission of the borough, and its members act as the licensing justices for the county borough. In non-county boroughs having separate commissions of the peace the position varies according as there are or are not ten justices for the borough. If there are ten or more, then a licensing committee, consisting of not less than three nor more than seven justices, is appointed, as in a county borough, but unlike the latter the justices composing the committee are the licensing justices for the borough only for certain purposes (*i*), while

carried on there and that the premises have no internal communication with premises in which another trade or business is carried on: *ibid.*, § 111; clubs do not require justices' licences, though they must, for the sale of intoxicating liquors, be registered with the clerk to the justices: *ibid.*, §§ 91 and 92.

(*e*) Licensing (Consolidation) Act, 1910, § 59.

(*f*) *Ibid.*, § 58.

(*g*) *Ibid.*, § 60.

(*h*) Licensing (Consolidation) Act, 1910, § 2.

(*i*) For the grant of new licences and the ordinary removal of licences.

for other purposes all the borough justices are licensing justices (*j*). In a borough with less than ten justices all the justices are licensing justices for all purposes (*k*).

The powers of licensing justices relate to the grant of new licences, the renewal of old ones and transfers and removals of licences, but not all the powers are to be exercised in the same way. We may consider the position in regard to each of these matters separately.

New Licences.—The grant of new justices' licences (*l*) is made by the licensing justices in their "general annual licensing meeting," which they are required to hold annually in the first fourteen days in February (*m*). They

"may at their general annual licensing meeting grant justices' licences to such persons as they, in the execution of their powers under this Act and in the exercise of their discretion, deem fit and proper" (*n*).

An applicant for a new justices' licence is required to advertise his intention of applying and to give certain notices (*o*), and the licensing justices, having heard him and any opponents, may determine to grant him a licence. Normally the licence will only be an annual one, coming up for renewal every year (*p*); but the justices may instead grant a licence for any term not exceeding seven years, and this latter licence does not require renewal, but lapses altogether at the end of the term fixed for its duration, so that then the licensee will have to apply for a new licence and cannot take advantage of the simpler procedure applicable to renewals (*q*).

(*j*) *I.e.*, for renewal, special removal and transfer of licences.

(*k*) Licensing (Consolidation) Act, 1910, §§ 2 and 3.

(*l*) That is, the grant of a licence otherwise than by renewal or transfer of an existing licence: Licensing (Consolidation) Act, 1910, § 12.

(*m*) Licensing (Consolidation) Act, 1910, § 10. They may hold adjourned meetings within one month thereafter.

(*n*) Licensing (Consolidation) Act, 1910, § 9. This gives the justices an absolute discretion which, so long as it is exercised in a judicial manner, cannot be appealed from or controlled by the High Court: *Sharp v. Wakefield* [1891] A.C. 173; 30 Digest 12, 49.

(*o*) Licensing (Consolidation) Act, 1910, § 15.

(*p*) *Ibid.*, § 41.

(*q*) *Ibid.*, § 14.

The licensing justices in granting a new licence may attach to it such conditions "as they think proper in the interests of the public." But they must attach conditions

"for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed,"

and any conditions requiring payments to be made by the licensee must be limited to the amount thus required to secure the monopoly value (*r*).

Confirmation.—The grant by the licensing justices at their general annual licensing meeting of a new licence and the settlement of the conditions to be attached to it are, however, only the first steps which must be taken by an applicant, for the licence requires to be confirmed by "the confirming authority" (*s*). This confirming authority in county licensing districts is quarter sessions, but its powers may be delegated to a committee, and, in particular, the power of confirming the grant of a new licence must be so delegated (*t*). In boroughs, whether county or non-county, the position varies according as there are or are not ten justices on the borough commission. In a borough having ten or more justices, all the borough justices compose the confirming authority; while, if there are fewer than ten borough justices, the confirming authority consists of a joint committee of six justices, three appointed by the borough justices and three appointed by the confirming authority of the county in which the borough is situated (*u*).

The applicant who has been successful in obtaining a new licence from the licensing justices must apply to the confirming authority after an interval of three weeks, and on the hearing of the application for confirmation any person, who appeared before the licensing justices and opposed the grant of the licence, but no other person, may appear and oppose its

(*r*) Licensing (Consolidation) Act, 1910, § 14.

(*s*) *Ibid.*, § 12.

(*t*) *Ibid.*, § 6.

(*u*) *Ibid.*, §§ 2 and 4.

confirmation (*v*). If the confirming authority decides to confirm, it may, with the consent of the licensing justices, vary the conditions attached to the licence (*w*).

Provisional Licences.—In order to give persons interested in premises about to be built or in course of construction some security as to their future plans, powers exist for the licensing justices and the confirming authority to grant and confirm provisional licences, to be of no force until the premises are completed and the licensing justices have made an order declaring the grant and confirmation of the licence to be final (*x*).

Renewal of Licences: (i) New Licences.—Since justices' licences are in general only annual, provision has to be made for their renewal. This is to be applied for at the general annual licensing meeting, and the licensing justices may renew licences without any necessity for confirmation. Usually renewal is a matter of little formality, and the licensee is not required to attend unless opposition is offered (*y*). The extent to which the justices have a discretion to refuse a renewal and the principles to be applied where renewal may be refused vary considerably. In the case of "new" justices' licences (*z*) the conditions attached, so as to secure for the public the benefit of the monopoly value, are designed to prevent the licensee from acquiring any power to argue that a refusal to renew his licence would be a deprivation of a valuable piece of property, and in the case of such licences, subject to an appeal to quarter sessions (*a*), the licensing justices' discretion to refuse a renewal is absolute (*b*). But the position is different in the case of licences originally granted before the Legislature had so

(*v*) Licensing (Consolidation) Act, 1910, § 13.

(*w*) *Ibid.*, § 14.

(*x*) *Ibid.*, § 33.

(*y*) *Ibid.*, § 16.

(*z*) *I.e.*, "new" as opposed to certain "old" licences which were first granted before the 25th June, 1902.

(*a*) *I.e.*, the quarter sessions of the county, even in the case of a borough (whether a county or non-county borough) with a separate quarter sessions. Thus the recorder, before whom borough quarter sessions are held, has no licensing powers at all.

(*b*) Licensing (Consolidation) Act, 1910, §§ 16 and 29.

clearly indicated that the grant of a licence was a mere privilege and not a piece of property, and there are two classes of such old licences to consider.

(ii) **Old Off-Licences.**—First, renewal of old off-licences (*c*) can only be refused on certain specified grounds, all relating either to the unsuitable character of the applicant or of the premises (*d*). In these cases where special grounds exist and the licensing justices refuse renewal of an old off-licence, the applicant may appeal to quarter sessions (*e*).

(iii) **Old On-Licences.**—Secondly, the position governing old on-licences (*f*) is somewhat complicated. Broadly speaking, there is a discretion to refuse renewal of all old on-licences, but in the absence of certain specified grounds, relating to the unfitness of the applicant or his premises, renewal can only be refused if provision is made for payment of compensation in respect of the loss of monopoly value. Hence the authorities who may refuse renewal of old on-licences differ according as compensation has or has not to be paid.

The licensing justices may only refuse the renewal of old on-licences where certain specified grounds for their refusal exist, and they must state to the applicant in writing the grounds of their refusal (*g*). Moreover, from their refusal to renew an appeal lies to quarter sessions (*h*). If none of these

(*c*) That is, justices' off-licences for the sale of wine, spirits, liqueurs, sweets, or cider in force and held by the applicant on the 25th June, 1902, including any renewals thereof to the applicant: Licensing (Consolidation) Act, 1910, 1st Schd., Pt. I. This, it will be seen, is a diminishing class, since it will finally disappear when by death, failure to renew, or other causes there are no longer any applicants who held such a licence in 1902.

(*d*) Licensing (Consolidation) Act, 1910, § 17 and 1st Schd., Pt. II.

(*e*) *Ibid.*, § 29.

(*f*) That is, on-licences in force on the 15th August, 1904, and renewals thereof, and old beerhouse licences, being old on-licences for the sale of beer or cider, with or without wine, granted in respect of premises for which a corresponding excise licence was in force on the 1st May, 1869, including renewals thereof. The applicant need not be the person in whom the old on-licence was vested at the material date. The grounds on which renewal may be refused by licensing justices vary somewhat according as the old on-licence is or is not also an old beerhouse licence: Licensing (Consolidation) Act, 1910, 2nd Schd., Pt. I.

(*g*) Licensing (Consolidation) Act, 1910, § 18 and 2nd Schd., Pt. II.

(*h*) *Ibid.*, § 29.

specified grounds exists, the power to refuse renewal is vested not in the licensing justices, but in the "compensation authority," and then only subject to the payment of compensation (*i*).

Compensation.—This compensation authority, both in the case of licensing districts which consist of petty sessional divisions of a county and of non-county boroughs, is the county quarter sessions, which must act, however, by a committee upon which the justices of each non-county borough are entitled to be represented by one of their number (*j*). In a county borough, on the other hand, the compensation authority is the whole body of borough justices (*k*).

When, therefore, licensing justices desire to obtain the suppression of an old on-licence and none of the specified grounds which entitle them to refuse renewal exists, they must refer the case to the compensation authority and submit a report. The compensation authority must consider the licensing justices' report, hear the persons interested in the premises, and may hear other persons, including the licensing justices, before coming to a decision. The compensation authority has, however, an absolute discretion to refuse renewal, but, if renewal is refused, compensation, based on the difference between the value of the premises when licensed and when unlicensed, must be paid (*l*). To enable the compensation authority to do this, a compensation fund is created in each county and county borough. This fund is raised out of charges imposed on all renewed old on-licences in these areas, the charges being levied with the duties paid for the excise licences of the premises in question (*m*). Thus the holders of old on-licences are compelled to provide the fund out of which is to

(*i*) Licensing (Consolidation) Act, 1910, § 18.

(*j*) *Ibid.*, § 6.

(*k*) *Ibid.*, § 2.

(*l*) *Ibid.*, §§ 19 and 20. The compensation is divided among the persons interested in the premises.

(*m*) Licensing (Consolidation) Act, 1910, § 21. The charges are graduated in accordance with the value of the premises: *ibid.*, 3rd Schd., Pt. I, and the licensee is entitled to deduct from his rent a percentage of the compensation levy varying with the unexpired term of his lease: *ibid.*, 3rd Schd., Pt. II.

be paid the compensation due to any of their number on a refusal to renew his licence.

Transfers and Special Removals.—Licensing law is not solely concerned with the grant and renewal of licences. A policy of restriction upon the number of licences must also make provision for the transfer of existing licences from one person to another and for the removal of a licence from one house to another. In relation to these matters the law, within limits, facilitates transfers and removals arising out of inevitable circumstances, while it discourages removals where exceptional reasons cannot be alleged.

A transfer

“is the grant of a justices’ licence in respect of certain premises to one person in substitution for another person who holds or has held the licence,”

and it may only be made in certain circumstances and to certain persons (*n*). A special removal is

“the removal of a justices’ licence from the premises in respect of which it was granted to other premises”

where the ground for the removal is that the premises are no longer available owing either to their requirement for some public purpose or to the effects of fire, tempest, or other unforeseen and unavoidable calamity (*o*). Both transfers and special removals are matters within the discretion of the licensing justices. To deal with such matters they are required at their annual general licensing meeting to appoint not less than four nor more than eight special sessions to be held in their district during the year, and applications for transfers and special removals may be heard and determined at any of these “transfer sessions” or at the general annual licensing meeting itself (*p*). The applicant in either case must give certain notices and attend the hearing, and other persons

(*n*) Licensing (Consolidation) Act, 1910, § 23 and 4th Schd. Transfers, e.g., may be made on the death of the licensee to his representatives or a new tenant or occupier of the premises.

(*o*) Licensing (Consolidation) Act, 1910, § 24.

(*p*) *Ibid.*, § 22.

may attend and oppose (*q*). An appeal lies to quarter sessions from the refusal of a transfer or special removal (*r*).

Ordinary Removals.—Removals, for any other cause than those inevitable circumstances which make the removal a special one, are “ordinary removals,” and are in effect dealt with as are applications for the grant of new justices’ licences, so that the licensing justices have an absolute discretion to grant or refuse the removal. Applications for ordinary removals may only be made at the annual general licensing meeting and are subject to confirmation by the confirming authority in the same manner as are the grants of new licences (*s*).

Licensing Powers of Petty Sessions.—Petty sessions have certain exceptional licensing powers, for the policy of the Legislature in restricting licences has inevitably made a licence an important privilege, and in emergencies it may be impracticable to await the next general annual licensing meeting or even the next transfer sessions to obtain authority to do some act without which a licence may be in danger of lapsing. Thus, if a tenant of licensed premises forfeits his licence or becomes disqualified by reason of some act on his part, the owner of the premises may apply to a court of summary jurisdiction for a “protection order” permitting him to continue the business until the next transfer sessions (*t*). Similarly, petty sessions may grant a protection order to a proposed transferee of a licence until the transfer can be authorised at the next transfer sessions (*u*). Again, “occasional licences,” authorising the sale of intoxicants temporarily on a special occasion, must be authorised by petty sessions (*v*).

Changes arising from the War.—The above-mentioned provisions remain the main statutes relating to licensing law, but war-time conditions have resulted in certain provisions

(*q*) Licensing (Consolidation) Act, 1910, §§ 25 and 27.

(*r*) *Ibid.*, § 29.

(*s*) *Ibid.*, §§ 24 and 26. Similarly, a provisional grant and confirmation for an ordinary removal to premises not yet completed may be obtained : *ibid.*, § 33.

(*t*) *Ibid.*, §§ 87 and 88.

(*u*) *Ibid.*, § 88.

(*v*) *Ibid.*, § 64.

designed to meet changed circumstances, such as war damage :—

(1) **Temporary Suspension, etc., of Justices' Licences.**—Justices' licences may be temporarily suspended where licensed premises have been destroyed or damaged, or where businesses have been discontinued owing to war circumstances, such as evacuation or requisitioning of the premises (*w*). Relief may also be granted where business is restricted for similar reasons (*x*).

(2) **Planning of Licensed Premises in War-damaged Areas.**—The Licensing Planning (Temporary Provisions) Act, 1945, makes temporary provision with regard to justices' licences in war-damaged areas and certain areas related to war-damaged areas. It applies to areas which may be declared by the Secretary of State to be licensing planning areas (*y*), and provides for the establishment of a licensing planning committee for each such area (*z*). Such areas may be varied or abolished (*a*). It is the task of every licensing planning committee to review the circumstances of its area (*b*), and the committee may then formulate proposals for the removal and surrender of licences (*c*).

Provision is made with regard to removals (*d*) and new licences (*e*) in licensing planning areas, and with regard to the surrender of licences and the suspension of provisions relating to the compensation fund (*f*). Provision is also made for the use of temporary premises (*g*).

Control of Licensed Premises.—The purpose of all these provisions, relating to the requirement of justices' licences, is to prevent drunkenness and to enable effective local control to be obtained over licensed premises and the persons managing them. Provision is made for the hours during which intoxi-

(*w*) Finance Act, 1942, § 10 (2)–(6) and Schd. VI. See also Finance Act, 1944, §§. 8 and 9.

(*x*) Finance Act, 1942, § 11.

(*z*) § 2.

(*a*) § 3.

(*d*) § 6.

(*e*) § 7.

(*b*) § 4.

(*f*) § 8.

(*y*) § 1.

(*c*) § 5.

(*g*) § 9.

cants may be sold and licensed premises may remain open (*h*), and for controlling the structural arrangement of licensed premises (*i*). In addition, stringent disqualifications for holding licences are imposed, both in respect of particular classes of persons and of particular types of premises (*j*). Lastly, disqualifications are also imposed on justices interested in any way in licensed premises or in the manufacture or sale of intoxicants, which prevent them from acting for any purpose under the Licensing Acts (*k*).

(*h*) Licensing (Consolidation) Act, 1910, §§ 55 and 57; Licensing Act, 1921, §§ 1 to 5 and 1st Schd.

(*i*) Licensing (Consolidation) Act, 1910, §§ 70 to 72.

(*j*) *Ibid.*, §§ 34 to 39.

(*k*) *Ibid.*, § 40.

APPENDIX

FORMULA OF WEIGHTED POPULATION

The formula of weighted population is calculated in three stages, the third being only applicable to counties other than London. The first stage, which deals with the weighting for children under school age (*i.e.*, five years) and for low rateable value, is calculated by reference to the estimated population of the county or county borough in the last year of the preceding fixed grant period; but the second and third stages, dealing with unemployment and sparsity of population respectively, produce "super-weightings," since they are calculated by reference, not to the estimated population, but to the figure produced by weighting the estimated population for the earlier factors.

Except in the third stage, the formula may be said to assume that there is a normal figure for each factor and to provide a weighting only where the actual figure is adversely abnormal. But the "normal" figures are so chosen as in fact to provide some weighting in most cases.

Stage I—The estimated population in the last year of the preceding fixed grant period (P) is increased by suitable percentages for

- (a) children under school age, and
- (b) low rateable value.

(a) The number of children under school age per 1,000 of the estimated population (C) is calculated, and for each unit, by which this exceeds the "normal" figure of 50 per 1,000, a weighting of 2 per cent. is added to the estimated

population. Thus, if $P = 100,000$ and C is found to be 60—that is 10 in excess of the “normal” figure of 50—a weighting of 20 per cent. of P , or 20,000, must be added.

(b) The rateable value, as shown in the valuation list in force on April 1 in the last year of the preceding fixed grant period, is divided by the estimated population to find the rateable value per head of the population (R), and for each £1, by which this is less than the “normal” figure of £10 per head, a weighting of 10 per cent. is added to the estimated population. Thus, if $P = 100,000$ and $R = £8$ —that is £2 less than the “normal” figure of £10—a weighting of 20 per cent. of P , or 20,000, must be added.

Stage I is completed by adding the two weightings for children under school age and for low rateable value to the estimated population in order to reach the First Intermediate Weighted Population (I).

$$\text{Thus } I = P + P \frac{(C - 50)}{50} + P \frac{(\pounds 10 - R)}{10}$$

If $P = 100,000$, $C = 60$ and $R = £8$

$$\begin{aligned} I &= 100,000 + 100,000 \frac{(60 - 50)}{50} + 100,000 \frac{(\pounds 10 - \pounds 8)}{10} \\ &= 100,000 + 20,000 + 20,000 = 140,000. \end{aligned}$$

Stage II.—The First Intermediate Weighted Population (I) is weighted by suitable percentages for unemployment. The average number of unemployed insured men plus one-tenth of the unemployed insured women during the last three calendar years of the preceding fixed grant period is expressed as a percentage of the estimated population (U). For each unit, by which this exceeds the “normal” figure of 1.5, a weighting of 10 per cent. of I is added. But if U exceeds 5, a still further weighting of 5 per cent. is added for each unit by which 5 is exceeded. Thus, if $I = 140,000$ and $U = 7.5$ —that is 6 more than the “normal” figure of 1.5—a weighting of 60 per cent of I , or 84,000, must first be added. But as 7.5 exceeds the higher figure of 5 by 2.5, a further

weighting of 12.5 per cent of I, or 17,500, must also be added.

The completion of Stage II is the finding of the Second Intermediate Weighted Population (W), which is the sum of the First Intermediate Weighted Population (I) and the weightings for unemployment.

$$\text{Thus } W = I + I \frac{(U - 1.5)}{100} 10 + (\text{if } U \text{ exceeds } 5) I \frac{(U - 5)}{100} 5.$$

If $I = 140,000$ and $U = 7.5$

$$\begin{aligned} W &= 140,000 + 140,000 \frac{(7.5 - 1.5)}{100} 10 \\ &\quad + 140,000 \frac{(7.5 - 5)}{100} 5 \\ &= 140,000 + 84,000 + 17,500 = 241,500. \end{aligned}$$

The Second Intermediate Weighted Population is the weighted population for county boroughs and the County of London, but in other counties a third stage is applicable.

Stage III.—In counties, other than London, the Second Intermediate Weighted Population (W) is further weighted for sparsity of population. Here, however, the idea of a "normal" figure is abandoned, and some weighting is always provided. The estimated population is divided by the road mileage, and, according as this figure of population per mile of road (S) is or is not less than 100, one or other of two alternative methods of determining the appropriate weighting is adopted.

If S is less than 100, for each unit by which S is less than 300, a weighting of one-third of 1 per cent. of W must be added. This, of course, means that a weighting of 1 per cent. of W is added for each 1 per cent. by which S is less than 300. Thus, if $W = 241,500$ and $S = 90$ —that is 210 less than 300 or a 70 per cent. deficiency—a weighting of 70 per cent. of W, or 169,050 must be added.

But if S is 100 or more, a more complicated calculation must be adopted, which, while giving some weighting in all

cases is designed to make the weighting vary inversely to the density of population as compared with road mileage. This weighting is obtained by dividing W by one-fortieth of the figure by which S exceeds 40. Thus, if W = 241,500 and S = 120 the figure will be 120,750.

The third stage is completed by adding together the Second Intermediate Weighted Population (W) and the weighting for sparsity of population obtained by whichever is the appropriate method. This is the weighted population of the county (F).

Thus, if S is less than 100, then

$$F = W + W \frac{(300 - S)}{300}$$

If W = 241,500 and S = 90

$$\begin{aligned} F &= 241,500 + 241,500 \frac{(300 - 90)}{300} \\ &= 241,500 + 169,050 = 410,550 \end{aligned}$$

But, if S is 100 or more, then

$$F = W + W \frac{40}{(S - 40)}$$

If W = 241,500 and S = 120

$$\begin{aligned} F &= 241,500 + 241,500 \frac{40}{(120 - 40)} \\ &= 241,500 + 120,750 = 362,250. \end{aligned}$$

INDEX

A

ABSENCE,

- councillors, of, effect of, 107-108
- mayor, of, effect of, 107, 108
- vacation of office for, 107

ACCOUNTS,

- borough councils, of, 197, 198
 - abstract of, 209
- City of London police, of, 657-658
- county councils, of, 165, 198, 199
- district councils, of, 196, 197
- education, 728
- Electricity Commissioners, of, 768
- Exchequer contribution, 176
- housing, 538
 - equalisation, 539
 - repairs, 539
 - revenue, 538, 539
- inspection of, 202
- local authorities, of, audit of, 199-211, 264, 344, 673
 - provision for keeping, 196-199
 - taxation, 175
- metropolitan borough councils, of, audit of, 264
- poor law, audit of, 344, 673
- rural district councils, of, 196, 197
 - parishes, of, 197
- urban district councils, of, 196

ACQUISITION OF LAND,

- aerodromes, for, 227 *n.*
- agreement, by, 227, 228, 237
 - requirements, in advance of, 228
- compulsory. *See* COMPULSORY PURCHASE OF LAND
- distribution of industry, for, 567
- education, for, 227 *n.*
- garden cities, for, 564
- generating stations, for, 767
- Housing Acts, under, 227, 525-529, 531
- libraries, for, 735, 736
- markets, for, 748
- municipal corporation, by, 237
- planning scheme, under, 550, 558, 564
- street construction and improvement, for, 601

Index

ACT OF PARLIAMENT,

- adoptive, 294, 312
- clauses. *See* CLAUSES ACTS.
- conferring powers, construction of, 441
- general, 292, 293
 - incorporation of Local Act powers by, 466, 490
 - procedure, 293
- local and private. *See* LOCAL ACTS
- parochial adoptive *See* PAROCHIAL ADOPTIVE ACTS
- Provisional Orders Confirmation, 313, 314
- validity of, 317

ACTION,

- injunction and declaration, for, when available, 285, 286, 287
- mandamus, for, procedure governing, 392

AD HOC AUTHORITIES,

- burial, for, 29
- creation of, 37
- elementary education, for, 29, 32, 697
- health, for, 29
- highways, for, 25, 29, 585, 586, 588
- improvement, for, 24
- land drainage, for, 23, 477, 631
- Metropolis, in, 269
- poor law, for, 24, 25, 28, 31
- purpose of, 23

ADJUSTMENTS,

- equitable, assigned revenues, of, 175
 - costs of Justice, of, 247
 - local taxation licence duties, of, 178
- financial, alteration of areas, on, 70, 71, 84, 85

ADMINISTRATION,

- introduction of paid experts to, 26
- judicial functions, relation to, 407, 408, 411, 412, 421, 432, 433
- legislation, relation to, 307, 308, 320, 321, 433

ADMINISTRATION OF JUSTICE,

- areas for, 240-253
- boroughs, in, 242, 243, 245-252
- counties, in, 240-242, 243-245
 - of cities and towns, in, 242, 245
- county boroughs, in, 247
- local government, relation to, 240, 243, 244, 246
- Metropolis, in, 270, 271

ADMINISTRATIVE BODIES,

- bias in members of, 416, 420-422, 426
- determination of question of law by, 422, 424, 426
- evidence submitted to, 420, 421, 423-427
- oral hearing by, 421, 423
- procedure of, 426, 427
- public hearing by, 420, 426, 427
- reasons for decisions of, 411, 418, 419, 421, 423-427

ADMINISTRATIVE CONTROL,

- growth of, 278, 358, 407-412
- influence of, 339-365
- law courts, and, 357, 358

Index

ADMINISTRATIVE COUNTIES,

- area of, 52
 - division of, 79
- periodical review of boundaries of, 67
- division of, 41
- number of, 52 *n.*, 73

ADMINISTRATIVE JUSTICE,

- judicial control over, 412-436
 - exclusion of, 428, 429
- procedure of, 419-427
- reasons for, 407, 408, 423-425, 430, 431

ADMINISTRATIVE LAW,

- France, in, 338, 401-403, 418
- growth of, 320, 321, 429, 430, 433-436
- Rule of Law, and, 429-432

ADMINISTRATIVE TRIBUNALS,

- appeals to, 410
- control of, 396

ADOPTION,

- bridges, of, 611, 612, 616
- highways, of, 595, 596
- private sewers, of, 506
- streets, of, 596, 599-601

ADOPTIVE ACTS, 294, 312

- parochial, 48, 197, 294

AD QUOD DAMNUM,

- writ of, 579, 580

ADVERTISEMENTS,

- county council accounts, of, 202
- planning scheme, regulation under, 564

AERODROMES,

- acquisition of land for, 227 *n.*
- expenses of, 771
- provision of, 469 *n.*, 553, 571

AGENT,

- appointment of, for making contract, 451, 452
- contracts, when may be made by, 451-455

AGRICULTURAL AUTHORITY,

- county council as, 54

AGRICULTURAL LAND AND BUILDINGS,

- de-rating of, 157
- rates, relief from, 170 *n.*

AGRICULTURAL MARKETING BOARDS,

- public corporations, as, 5

AIR COUNCIL,

- aerodromes, powers as to, 771

AIR RAID PRECAUTIONS,

- control of, 5, 37, 476
- grants in aid of, 188, 662
- local authorities, duty of, as to, 662
- schemes, 662

Index

ALDERMEN,

- borough,
 - casual vacancies among, filling, 92, 93
 - election of, 61, 88, 113
 - number of, 61, 88
 - qualification of, 61, 88
 - retirement of, 61, 88, 89
 - returning officers, as, 109
 - term of office of, 61, 88, 92
- casual vacancies among, filling, 92, 93, 108 *n.*
- City of London, of, 259, 260
 - casual vacancies among, filling, 92, 93
- county,
 - casual vacancies among, filling, 92
 - election of, 53, 61, 88, 113
 - effect of, 53 *n.*
 - number of, 53, 88
 - qualification of, 53, 88
 - retirement of, 53, 88, 89
 - term of office of, 53, 89
- Court of. *See* COURT OF ALDERMEN
- election of, 53, 61, 88, 113
 - effect of, 108
- London County Council, of, number of, 261
- metropolitan borough, of, number of, 264
- position of, 89
- principle of appointment of, 88, 89

ALIEN,

- electoral franchise, rights of, 95 *n.*

ALLOTMENTS,

- compulsory purchase of, 233, 234 *n.*
- rural parishes, provision by, 48, 238 *n.*

ALTERATION OF AREAS,

- boroughs, of, 73
- catchment areas, of, 631, 635
- central control over, 343, 344, 349
- compensation for officers on, 84, 126
- counties, of, 73-76, 97
- county boroughs, of, 73, 76
 - councils, by, 54
 - districts, of, 74, 76, 79, 82
 - electoral areas, of, 79, 80
- elasticity, necessity for, 66
- financial adjustments on, 70, 71, 84, 85
- internal drainage districts, of, 634
- local Acts, by, 85, 86
 - Government Board, by, 73
 - Boundary Commission, by, 75-77, 84
 - inquiries in respect of, 69, 80, 81, 82
- non-county boroughs, of, 76
- obsolete powers for, 71, 72
- parishes, of, 74, 83, 84
- periodical review of county areas, on, 67
- principle applied in, 66, 67, 71-75
- private Bill, by, 85, 86

Index

ALTERATION OF AREAS—*continued.*

- property adjustments on, 70, 71, 84
- provisional orders, by, 73, 74
- rural districts, of, 76
- transfer of officers on, 70, 84, 126
- urban districts, of, 76
- wards in boroughs, of, 80-82
 - rural districts, of, 82
 - urban districts, of, 82

AMBULANCES, provision of, 512

ANIMALS, diseases of, central control over, 39

ANIMUS DEDICANDI, 575-578

ANNUITY CERTIFICATE, loan by, 193

APPEAL, administrative decisions, from, 334, 386, 387, 397-400, 412 alteration of wards, as to, 82 assessment committee, from, 160, 161 case stated, by, 400 clearance order, against, 400, 526, 527 closing orders, against, 399, 434, 435, 523 compulsory purchase order, against, 234 *n.*, 400, 526, 527 demolition order, against, 399, 434, 435, 522, 523 district auditor, from, 205-208, 386, 410-412 interim development order, against refusal of, 558, 559 justices of the peace, to, 398, 399, 410 land drainage ratings, as to, 637 local authorities, by, Ministry of Health, to, 39 notice requiring repairs, against, 399, 522 order for payment out of borough general rate fund, from, 198, 289, 386, 400 county fund, from, 199, 386, 400 parish council, by, Minister of Health, to, 143 planning scheme, against, 399, 562 private Bill, by promotion of, 85 - street works, as to, 398, 423, 598 public service vehicle licence, from refusal of, 775, 776 rating, quarter sessions, to, 160, 161 statutory. *See* STATUTORY APPEALS

APPEAL TRIBUNAL, Road Traffic Act, under, 778

APPORTIONMENT, county and county borough, determination of, 184 general exchequer grants, of, 185 London County Council, 266, 267

APPRENTICESHIP, poor law children, of, 687

ARBITRATION, adjustments on alteration of areas, as to, 84 prohibition of traffic over bridge, as to, 615

Index

AREAS,

- administration of justice, for, 240-252
- alteration of. *See* ALTERATION OF AREAS
- combination of, 141, 145, 343, 344, 476-478, 673
- development of, 565-567
- electoral. *See* ELECTORAL AREAS
- enlargement of, administration, for, 36, 51, 63, 476
- extension of, principle applied in, 66, 67, 71-75
- local administrative, 35, 41
- overlapping of, 29-31
 - prevention of, 30, 43, 72
- review of, 38
- simplification of, 31
- war damaged, licences in respect of, 551
 - redevelopment of, 530, 565-567

ARMORIAL BEARINGS,

- licences for, abolition of, 178 *n.*, 773 *n.*

ART,

- galleries, provision of, 735
- schools for, provision of, 735

ASHPITS,

- cleansing of, 509

ASSESSMENT,

- appeals from, 160, 161
- areas, determination of, 159
 - Metropolis, in, 264, 265
- basis of, 155, 156
- committees. *See* ASSESSMENT COMMITTEES
- de-rating, 157, 158
- gross value, 156
- hypothetical tenant, of, 155, 156
- net annual value, 156, 157
- non-provided schools, of, 709
- quinquennial revaluation, 158
- railways, of, 155, 157, 158
- rateable value, 154, 156, 157
- uniformity in, 159, 161-163

ASSESSMENT COMMITTEES,

- appointment and composition of, 159
- duties of, 159-161
 - Metropolis, in, 265
- nature of functions of, 160, 161, 397, 416, 420 *n.*
- precepting authorities, as, 164 *n.*
- travelling expenses of members of, 239
- valuer, employment of, by, 161

ASSIGNED REVENUES,

- adjustments of, 175
- distribution of, 175, 176

ASSIZES,

- areas for, 241, 243, 245
- costs of, payment of, 240, 244, 246, 247

Index

ATTORNEY-GENERAL,

- actions within Public Authorities Protection Act, 1893.. 458
- fiat* of, petition of right to, effect of, 372
- local authorities, funds of, protection by, 195

AUDI ALTERAM PARTEM,

- application of maxim, 416-418, 420-422

AUDIT,

- borough, early system of, 200, 201, 208
 - methods available, 200, 201, 208
- district, accounts subject to, 202, 208, 210, 264, 344, 673, 728
 - Metropolis, in, 234, 264
 - procedure at, 202-205
 - report on, 205
- history of, 199-201
- metropolitan borough council accounts, of, 264
- professional, adoption of, by borough council, 210, 211

AUDITORS,

- borough, duties of, 209
 - supersession of, 200, 208-211
- district, accounts audited by, 201, 202, 208, 210, 264, 344, 357, 673, 728
 - appeal from, 205-207, 386, 400, 411, 412
 - appointment and assignment of, 201
 - audit by, 201-205
 - central control by, 344, 349
 - disallowance by, 203, 204
 - powers of, 202-204, 206, 207, 210
 - quasi judicial functions of, 203
 - reports of, 205
- elective, disqualification of, 102
 - duties of, 209
 - election of, 209
 - proceedings for testing qualifications of, 119, 120
 - qualification of, 209
- Fishery Board, of, appointment of, 620
- Mayor's, appointment of, 209
- professional, appointment and duties of, 210, 211

B

BALLOT,

- elections, at, 112

BANKRUPTCY,

- disqualification by, 104
- unchallenged election of person after, effect of, 105, 106

BATHS AND BATHING PLACES,

- provision of, 48, 510, 511, 737, 738

BEERSHOPS AND BEERHOUSES,

- licences for, 781

BENEFICIAL OCCUPATION,

- assessment in respect of, 155

Index

- BENEFICIAL SERVICE,
sanitation as, 172
- BENTHAM, JEREMY,
influence of, 27, 339
- BETTERMENT,
planning schemes, under, 563
principle of, 527, 528
- BIAS,
administrative bodies, in, 420, 421, 426
judicial control, as affecting, 416
- BIRTHS,
notification of, 512, 513
registration of, 32 *n.*
- BLIND PERSONS,
education of, 715, 716
provision for, 494
- BOARD OF EDUCATION,
replacement of, 347
- BOARD OF TRADE,
bye-laws, confirmation of, by, 217 *n.*
electricity powers of, 764-768
fishery powers of, 619
industrial undertakings, power to direct, 568
labour exchanges, control over, 474
tramway powers of, 760, 762
- BOARDING-OUT COMMITTEE,
duties of, 687
- BONA FIDES
judicial functions, in exercise of, 418, 419, 421
- BOROUGH,
absence of central control over, 29, 59, 339, 340
accounts of. *See* ACCOUNTS
administration of justice in, 242, 243, 245-253
aldermen. *See* ALDERMEN
alteration of boundaries of, 73
auditors, 208
central control, absence of, over, 59
commission of assize issued to, 242, 245
the peace of, 58, 242, 245, 250-252
common law corporation, is, 287
constitution of, 264
coroners of, appointment of, 242, 245, 250
corporate land of, 236, 237
costs payable in, 247
county and, relations between, 246, 247
rates, exemption from, 246
courts of, 12
creation of, 12, 13, 57, 59, 66-71, 287, 613
definition of, 58 *n.*
division into wards, how effected, 60 *n.*, 71, 81
electoral areas, as, 97
fines imposed in, 113, 114, 250, 251

Index

BOROUGH—*continued.*

- former position of, 242
- freemen of, former position of, 237
- general rate fund of. *See* GENERAL RATE FUND
- history of, 12, 13, 19, 20, 23, 24, 28, 29, 31, 57-59
- Improvement Commissioners, creation of, in, 58
- incorporation of, 67-71, 287
- justices, appointment of, 15, 28, 242, 243, 250
- Mayor of. *See* MAYOR
- municipal. *See* MUNICIPAL CORPORATIONS
- no judicial organisation, with, 251
- officers of, appointment of, 61, 124
- parliamentary constituency, as, 12, 13
- police forces in, 649-654
- population of 10,000, with, 248-251
 - under 10,000, with, 251, 252
- reform of, 28, 29, 58, 59
- reformed, absence of central control over, 339, 340
 - advantages of, 35, 467, 468
- returning officers of, 109
- separate commission of the peace, with, 250, 251
 - quarter sessions, with, 249
- stipendiary magistrate, appointment of, in, 252
- unemployment distress committee for, 473

BOROUGH COUNCIL,

- accounts of, abstract of, 209
 - audit of, 200-202, 208-211, 352 *n.*
 - provision for keeping, 197
- bridges, repair of, by, 614
- byelaws, confirmation of, 215, 216, 218
 - power to make, 215, 216, 217
- candidates for, nomination of, 109, 110
- clerk of the peace, appointment of, by, 250
- composition of, 60
- compulsory purchase of land by, 227, 228
- coroner, appointment of, by, 250
- costs of administration of justice paid by, 245-252
- default powers of, 635
- district audit, adoption of, by, 210
- elections to, date of, 109
 - order for holding, 386, 387
- expenses of, payment of, 197, 198
- food and drugs authority, as, 497
- general rate fund of. *See* GENERAL RATE FUND
- highway authority, as, 594
- housing authority, as, 520
- increase of powers of, 468
- meetings of, business transacted at, 129
 - number of, 61, 62
 - Standing Orders governing, 213 *n.*
- metropolitan borough council, distinguished from, 264
- nominations for, 109, 110
- officers of, appointment of, 61, 124
- powers of, 287-291
- professional audit, adoption of, by, 210, 211
- promotion or opposition of legislation by, 297-301

Index

BOROUGH COUNCIL—continued.

- road account, audit of, 208 *n.*
- stipendiary magistrate, application for, *by*, 253
- statutory regulation of powers of, 288–291
- town clerk, appointment of, 61, 124
- unincorporated, *is*, 60
- watch committee, relation to, 139, 651

BOROUGH COUNCILLORS,

- absence of, effect of, 107, 108
- aldermen, election *as*, effect of, 108
- alteration of number of, 60 *n.*, 81
- apportionment among wards of, 60, 81
- casual vacancies among, filling, 92, 93
- ceasing to be qualified, 107
- election of, 60, 91
 - suspension of, 60 *n.*, 92
- partial renewal of, 90, 91
- resignation of, 107
- retirement of, 60, 90
- term of office of, 60, 90
 - extension of, 92, 93

BORROWING. See LOANS

BORSHOLDER,

- duties of, 638 *n.*

BREACH OF TRUST,

- local authorities' funds, *as to*, remedy for, 195, 196

BREWSTER SESSIONS,

- introduction of, 782

BRIBERY,

- elections, *at*, 115, 116

BRIDGE MONEY

- county, 610

BRIDGES,

- adoption of, 611, 612, 616
- borough, repair of, liability for, 609, 610, 613, 614
- canal, adoption of, 616
 - construction of, 616
 - maintenance of, 616
- City of London, maintenance by, 260
- classes of, 610
- county, repair, liability for, 609, 610, 613, 614
 - roads, *in*, 614
- disturnpiked road, *in*, 611
- erection by county council of, 612
- highway, over, right to erect, 572
- hundred, repair of, 610
- local authorities, transfer to, 612
- maintenance of, 18, 609–611
- Metropolis, *in*, control of, 258
- parish, repair of, 610
- railway, adoption of, 616
 - construction of, 616
 - maintenance of, 616

Index

BRIDGES—*continued.*

- reconstruction of, 614-623
- repair of, 609-616
 - highway authorities, by, 613, 614
 - history of, 18, 609-614
 - hundred, by, 610
 - indictment for, 609
 - parish, by, 610
 - prescription, by, 609, 610
 - ratione tenuræ*, 609, 610
 - roadway of, 613
- tolls, freeing from, 612
- traffic over, prohibition of, 615
- tramway, adoption of, 616
 - construction of, 616
- trunk roads, in, 614

BRIDLEWAYS, highways, *are*, 571

BRITISH BROADCASTING CORPORATION, Public Corporation, *as*, 5

BUILDING LINES, roads, in, consent to, 604 streets, in, regulation of, 603 scheme for, 553

BUILDINGS, alteration of, 499, 501 dangerous, 502 erection of, distribution of industry, *for*, 567 industrial, notice of erection of new, 568 streets, in, 602, 603 supply of gas to, 758 temporary, 502

BURGESSES, local government electors, *as*, 60

BURIAL, poor law relief *for*, 682

BURIAL BOARDS, creation of, 29

BURIAL GROUNDS, disused, transfer of, 514

BYE-ELECTION, circumstances causing, 107 method of holding, 108

BYE-LAWS, breach of, 220, 223, 382 building, confirmation of, 218 - default powers, 364 - enforcement of, 382 - power to make, 215, 499, 554 - relaxation of, 224 - temporary operation of, 224 *n.* certainty of, 220

Index

BYE-LAWS—*continued.*

- charter, under, 214
- coming into force of, 219
- common lodging-houses, for, 498
- confirmation of, 215, 216, 217 *n.*, 218
- corporations, of, 214
- defined, 214, 215
- elementary education, for, 701
- employment of children, as to, 721, 722
- enforcement of, 223, 382, 383
 - metropolis, in, 262
- evidence of, 221
- fishery board, of, 620
- good rule and government, for, 215-218, 262
- injunction to restrain breach of, 223, 383 *n.*, 384
- judicial control over, 221-224
- libraries, for, 735
- London County Council, of, 262
- making of, 217
- markets, for, 748
- metropolitan borough councils, of, 262
- model, 219, 220
- moveable dwellings, for, 498
- new streets, for, 499, 601
- nuisances, for prevention and suppression of, 215, 218, 262, 748
- offensive trades, for, confirmation of, 218
 - temporary operation of, 224 *n.*
 - urban authority, by, 495
- powers to make, 149, 214-217
- public conveniences, for, 510
- reasonableness of, 222, 223, 383 *n.*
- relaxation of, 224, 502
- repugnancy of, 221, 222
- sanitary, power to make, 215
- slaughterhouses, for, 749
- street trading by children, for, 721, 722
- telegraph wires, for, 217 *n.*
- temporary operation of, 224, 500
- trade effluent, 508
 - confirmation of, 218 *n.*
- ultra vires*, 221
- unreasonable, revocation of, 500
- validity of, 218 *n.*, 220-223, 321
 - judicial tests of, 221-224
- void for uncertainty, 221
- water, for, confirmation of, 218 *n.*
 - relaxation of, 224
 - temporary operation of, 224 *n.*
- working class houses, for, 521

C

CABINET SYSTEM,

- central government, in, 130
- local government, in, 133, 134

Index

- CAMPING,
 licensing of, 489, 499
 sites for, provision of, 515, 737
- CANAL,
 boats, inspection and registration of, 498
 police, engagement of, 658
 rateable value of, 157, 158
- CASE STATED,
 appeal by way of, 400
- CASUAL POOR,
 poor relief to, 685, 686
- CASUAL VACANCY,
 filling, 92, 93, 108
 when elections caused by, 108, 113
- CATCHMENT AREAS,
 alteration of, 631, 635
- CATCHMENT BOARDS,
 annual report of, 635
 creation of, 477, 631, 632, 635
 duties and powers of, 632-634
 internal drainage boards, transfer of powers of, to, 635
 membership of, 632, 635
 precepts of, 634
- CENTRAL BOARD OF HEALTH,
 creation of, 484
- CENTRAL CONTROL,
 Administrative, 38-40
 absence of, municipal corporations, over, 29, 59, 339, 340
 acquisition and disposition of land, over, 229, 230, 237, 238
 alteration of areas, over, 343, 344, 349
 audit, by, 344, 359
 bye-laws, over confirmation of, 215, 216, 219, 220
 default powers, by, 360-365
 delegated legislation, by, 319, 342, 343, 348, 349
 departments exercising, 38-40
 development of, 338, 339
 education, over, 38, 341, 347, 350 *n.*, 352, 362, 363, 408, 671,
 672
 finance, over, 350-360
 excessive and unreasonable expenditure, over, 357,
 358
 grants in aid, through, 171, 173, 174, 176-179, 351-
 359
 loans, over, 344, 359, 360
 highways, over, 39, 341, 357, 364, 411
 history of, 13, 14, 19-22, 26-28, 30, 38-40, 338-341, 486-489
 housing, over, 352, 362
 inspections and inquiries, by, 344, 349, 350
 nineteenth century development of, 278-280
 officers, over, 344-346, 353-356
 police, over, 341, 348, 350 *n.*, 351, 352, 652-655

Index

CENTRAL CONTROL—*continued*.

Administrative—*continued*.

poor law, over, 28, 30, 38, 39, 59, 339-346, 364, 671, 672
public health, over, 30, 39, 40, 340, 341, 350, 353-357, 655, 656
schemes, confirmation of, by, 348

Judicial. *See* JUDICIAL CONTROL

Legislative, importance of, 308, 309
necessity for, 277

CENTRAL CRIMINAL COURT,

jurisdiction of, 260

CENTRAL DEPARTMENTS,

administrative control of, 338-368

appeals to, 390, 407-412

judicial control over, 390, 391, 396, 397, 399, 400

functions of, 371, 396, 397, 407-412, 422

legal proceedings by, outside Public Authorities Protection Act, 1893..
458

liability of, 371-373

schemes, approval of, by, 316, 348

CENTRAL ELECTRICITY BOARD,

control by, 469

duties of, 770

CENTRAL VALUATION COMMITTEE,

creation and composition of, 163

duties of, 163

CENTRAL WATER ADVISORY COMMITTEE,

appointment of, 751

CERTIORARI, ORDER OF,

application of, 396

control of judicial decisions by, 412, 425, 426

extension of scope of, 393, 394

nature of, 393

order of prohibition, relation to, 393

statute, given by, 386, 393

taking away, 428

CESSPOOLS,

bye-laws as to, 500

cleansing of, 509

CHAIRMAN,

acceptance of office as, 113

county council, of,

election of, 53, 88 *n*.

justice for county, is, 53

qualification of, 53, 88

remuneration of, 53, 103

term of office of, 53, 88 *n*.

district council, of,

duties of, 50

election of, 50, 88 *n*.

justice for county, is, 50

qualification of, 50, 88

term of office of, 50, 88 *n*.

Index

CHAIRMAN—*continued*.

- London County Council, of, 261
- parish council, of,
 - election of, 46, 88 *n.*
 - notice of resignation to, 107
 - qualification of, 46, 88
 - resignation of, 107
 - term of office of, 46, 88
- parish meeting, of,
 - election of, 45
 - parish council chairman as, 44
 - resignation of, 107
- rural district council, of,
 - election of, 50, 88 *n.*
 - justice for county, is, 50
 - qualification of, 50, 88
 - term of office of, 50, 88 *n.*
- urban district council, of,
 - election of, 50, 88 *n.*
 - justice for county, is, 50
 - qualification of, 50, 88
 - term of office of, 50, 88 *n.*
- Ways and Means, of, allocation of local Bills by, 303
- discretion of, 306

CHARITY COMMISSIONERS,

- parish land, consent to disposition of, 238

CHARTER,

- borough created by, 12, 57, 67, 69-71, 287
 - division of borough into wards by, 71, 81
 - effect of, 71
- bye-laws under, 214
- corporation created by, 284
- market created by, 744
- revocation or forfeiture of, 20, 284

CHIEF CONSTABLE,

- borough, of, appointment of, 651
- county, of, appointment of, 646, 647, 651
 - constables, powers over, 409, 646, 647, 651
- hundred, of, appointment and duties of, 640
 - chief pledge, relation to, 640

CHIEF PLEDGES,

- constables, relation to, 640
- duties of, 638, 640, 641

CHILD WELFARE,

- extension of, 471
- provisions for, 512-514

CHILDREN,

- blind and deaf, education of, 715, 716
- defective and epileptic, education of, 715-717
- employment of, 721, 722
- meals, provision of, for, 717, 718
- medical inspection and treatment of, 695, 718
- street trading by, 721, 722

Index

- CHILDREN'S HOMES,
 - health records in, 686
 - training in, 686
- CHOLERA,
 - outbreaks of, central control, introducing, 39, 481, 484, 485
- CHURCHWARDENS,
 - ecclesiastical officers, as, 16
 - election of, 16
 - parochial officers, as, 18
 - Statute of Highways, duties under, 582, 583
- CINEMATOGRAPH EXHIBITIONS,
 - licensing of, 395, 415 *n.*, 779, 780
- CITIES,
 - creation of, 59
- CITY OF LONDON,
 - area of, 256
 - corporation of, body corporate, is, 259
 - constitution of, 259, 260
 - London County Council, relations with, 255, 256, 260
 - unreformed, is, 59, 255, 256
 - county of itself, is, 259
 - Court of Aldermen of, 259, 260
 - Common Council of, election of, 260
 - Hall of, 259
 - divisions of, 259
 - general exchequer grants of, 267
 - Lieutenancy of, 259
 - Lord Mayor of, election of, 259
 - metropolitan police acting in, 657
 - parishes in, 657
 - quarter sessions in, jurisdiction of, 260
 - Recorder of, election of, 260
 - sheriffs of, election of, 259
 - wards of, 259, 260
 - watchmen of, 643, 644
- CIVIL DEFENCE SERVICE,
 - local authorities, by, 662
- CIVIL PARISHES,
 - defined, 43
 - ecclesiastical parishes in relation to, 43
 - history of, 44
- CLASSIFIED ROADS,
 - county roads, as, 591
 - new access to, consent for, 574, 575
- CLAUSES ACTS,
 - private Bills, incorporation in, 311
 - provisional orders, incorporation in, 312 *n.*
 - Public Health Acts, incorporation in, 311, 487
 - utilities, governing, 742, 743
 - purpose of, 310, 311, 485
 - special order, incorporation in, 312 *n.*
- CLEANSING,
 - houses and streets, of, 509
 - verminous persons, of, 510

Index

CLEARANCE

- area, compensation in respect of, 527-529
- compulsory purchase of land in, 525
- order, advertisement of, 526
- appeal against, 400, 526, 527
- Housing Acts, under, 525

CLERK,

- county council, of,
 - appointment of, 55, 124
 - clerk of the peace, when automatically becoming, 56
 - dismissal of, 126, 356
 - registration officer, as, 94
- district council, of,
 - appointment of, 51, 124, 125 *n.*
 - returning officer, as, 109
- justices, to, appointment and salary of, 244, 250, 251
- parish council, of, appointment and remuneration of, 48, 123 *n.*
- Peace, of the,
 - appointment of, 55, 250
 - functions of, 15
- petty sessional division, of, appointment of, 15
- rural district council, of,
 - appointment of, 51, 124, 125 *n.*
 - returning officer, as, 109
- urban district council, of, appointment of, 51, 124, 125 *n.*

CLOSING ORDERS,

- appeal against, 399, 434, 435, 523
- authority to make, 425, 433, 434, 523

CLUBS,

- registration of, 783

COAL,

- proposed powers for local authorities to sell, 470

COLD-AIR STORE,

- provision of, 749

COMMISSION,

- assize, of, 241, 242, 245
- gaol delivery, of, 241, 242
- local government boundary. *See* LOCAL GOVERNMENT BOUNDARY
- COMMISSION
- nisi prius*, of, 241, 242
- Peace, of the, boroughs, for, 58, 242, 245, 250, 252
- counties, for, 57, 241

COMMISSIONER,

- City of London police, of, 644, 657
- election, appointment and qualifications of, 116
- certificate of, 117
- metropolitan police, of, 272, 656

COMMISSIONERS OF SEWERS,

- abolition of, 632, 633
- appointment of, 625
- duties of, 482, 483, 625-627
- Metropolis, in, 257

COMMISSIONERS OF WORKS,

- transfer of functions of, 549

Index

- COMMITTEE AND PRIVATE BILL OFFICE, 301, 302, 304
- COMMITTEE ON MINISTERS' POWERS,
 - appointment of, 332
 - report of, 429, 430
- COMMITTEE ON UNOPPOSED BILLS,
 - constitution of, 305 *n.*
- COMMITTEE STAGE,
 - General Bills, in, 293, 319, 320
 - Local Bills, in, 304-306, 308, 310
 - Provisional Orders Confirmation Bills, in, 313
 - Public Works Facilities Act, 1930, under, 316
- COMMITTEE SYSTEM,
 - advantages of, 149
 - development of, 135-149
- COMMITTEES,
 - accounts of, audit of, 148, 202
 - acts requiring approval, 138, 139
 - appointment of, 135, 136
 - composition of, 136, 137, 143
 - compulsory, 135
 - control of, 137-141, 147-149
 - councils, relation with, 137, 138, 147-149
 - delegation by, sub-committees, to, 140-141
 - to, 140-143, 148 *n.*
 - disability of members of, 123
 - executive powers of, 139
 - Food Control, appointment and approval of, 7
 - maternal and child welfare, for, composition of, 137
 - minutes of, 139
 - parochial, delegation to, rural district council, by, 142, 143
 - powers of, 137-141
 - standing orders governing, 138, 148, 213
 - statutory, 135, 137, 139, 141, 148 *n.*
 - Unemployment Assistance Board, local appointment of, 7
- COMMON COUNCIL,
 - City of London, of, constitution of, 260
 - housing authority, as, 520
- COMMON COUNCILMAN,
 - City of London, of, election of, 260
- COMMON LODGING HOUSES,
 - conduct of, 498
 - registration of, 498, 780
- COMMON SEAL,
 - corporations, of, purpose of, 283, 449, 450
- COMMONS,
 - compulsory purchase of, 233, 234 *n.*
- COMMUNITY CENTRES,
 - provision of, 515, 737
- COMPENSATION,
 - authority, 789
 - compulsory purchase, on, 231, 527-531, 551
 - electricity undertaking, on purchase of, 766

Index

COMPENSATION—*continued.*

- fund, 789
- interim development order, respecting, 560
- levy, 789
- officers, to, alteration of areas, on, 84, 126
- planning scheme, under, 548, 554
- refusal to renew old on-licences, on, 789
- ribbon development, under, 575, 605
- slum clearance, for, 527-529
- street level, for alteration in, 574
- war damaged areas, on redevelopment of, 566, 567

COMPOSITION WITH CREDITORS,

- disqualification for, 104
- unchallenged election of person after, effect of, 106

COMPOUNDING ARRANGEMENTS,

- rates, for payment of, 169

COMPULSORY PURCHASE OF LAND,

- aerodromes, for, 771
- appeal by parish council from county council as to, 408
- clearance area, in, 525-527
- compensation on, basis of, 527, 528, 531, 551
- compulsory purchase order, by. *See* COMPULSORY PURCHASE ORDER
- highways, for, 606
- Housing Acts, under, 473, 525-527, 529
- local Acts, under, 229
- parish council, on behalf of, 228-230, 235, 236, 367, 428
- powers of, 228, 229, 735, 767
- procedure on, 229-236
- provisional order, by. *See* PROVISIONAL ORDERS
- Public Works Facilities Act, 1930, under, 234, 235

COMPULSORY PURCHASE ORDER,

- appeal against, 234 *n.*, 400, 526, 527
- availability of, 231
- confirmation of, 230, 232, 234 *n.*, 411, 421, 422, 525
- Housing Acts, under, 400, 525-527
- making of, 232
- notice to treat, 235
- objections and inquiries, 232, 525
- Public Works Facilities Act, under, 234, 235
- validity of, 233-235, 428

CONDUCTORS' LICENCES,

- public service vehicles, of, 776

CONFERENCES,

- expenses of, 239, 674

CONFIRMING AUTHORITY, 786

CONSCIENCE CLAUSE,

- effect of, 698

CONSERVATORS,

- fisheries, of, appointment of, 618, 619
- peace, of the, 14, 15
- Thames, of, 273, 632 *n.*

Index

CONSOLIDATED FUND,
payments out of, 271

CONSTABLES,
additional, 646
appeals by, Home Secretary, to, 409
arrest, powers of, 641, 642, 660
borough, appointment of, 650
 complaints against, 650
 powers of, 658
 promotion of, 650
 suspension of, 409, 625
 swearing in of, 658
 wrongful arrest by, 650
chief. *See* CHIEF CONSTABLE.
City of London, of, 657
complaints against, 650
county, appointment of, 647, 651
 area of authority of, 647, 658
 powers of, 645, 646, 658
 swearing in of, 647, 658
dismissal of, 409, 650, 659
duties of, 658-660
firemen, employed as, 663
justices, control by, over, 15, 641
legal position of, 440, 638, 650
metropolitan, appointment of, 656
 area of authority of, 656, 657
 swearing in of, 656
municipal elections, disabilities respecting, 659
parish. *See* PARISH CONSTABLE
pensions of, 659
petty. *See* PETTY CONSTABLES
powers of, 660
railway and canal, 658
special, appointment of, 645, 646, 650
 creation of, 643, 644
vote of, 659
women, 658
work of, 661

CONTRACTS,
corporation, of, 448-455
Crown, on behalf of, 372, 373
local authorities, of,
 absence of seal, effect of, 450-455
 agent, made by, 451-455
 appointment of agent for, 451, 452
 breach of, within Public Authorities Protection Act, 1893.. 457,
 458
 formalities for making, 213 *n.*, 449-451
 incompatible with statutory duties or powers, 448, 449
 liability on, 373
 notice of, 213 *n.*, 449
 power to make, 449
 ratification under seal of, 450
 tenders for, 213 *n.*, 449

Index

CONTRACTS—*continued*.

- municipal corporations, of, validity of, 288, 448
- officer of local authority, of, 128
- police protection, for, 660
- seal, necessity for, 449-453
 - not under, 450, 454, 455
 - ultra vires*, 286, 448, 449
- urban authorities, of, 453, 454

CONTRIBUTIONS,

- treasurer of borough and county, between, 246, 247, 248

CONTRIBUTORY PLACE,

- definition of, 142 *n.*, 167 *n.*
- parochial committee for, 142, 143
- special expenses in, 167 *n.*, 196, 197

CONVICT,

- electoral franchise, rights of, 95*n.*
- unchallenged election of, effect of, 105, 106

CORONERS,

- borough, appointment of, 242, 245, 250
- county, appointment of, 14, 57, 240, 243
 - jurisdiction in boroughs of, 250-252
- disqualification of, 102
- duties of, 57, 240
- institution and purpose of, 14

CORPORATE LAND,

- acquisition of, municipal corporation, by, 237
- defined, 237
- disposal of, 237
- freemen's rights in, 237
- income of, 151, 152, 237, 289, 290
- lease of, 237
- mortgage of, 183 *n.*, 193 *n.*, 237
- power to acquire, 237
- sale of, 237
- workmen's dwellings on, 517

CORPORATIONS,

- advantages of, 47
- bye-laws of, 214
- characteristics of, 282-284
- classes of, 284
- common law,
 - creation of, 284
 - doctrine of *ultra vires* and, 284-286, 448
 - forfeiture of charter of, 284
 - municipal corporations are, 287
 - powers of, 284-286
 - statutory limitation of, 287
- common seal of, purpose of, 283, 449, 450
- contracts of, 448-455
- creation of, 284
- debts of, liability of members for, 283
- local authorities are, 282, 448
- nature of, 282, 283

Index

CORPORATIONS—*continued*.

- statutory,
 - creation of, 284
 - doctrine of *ultra vires* and, 285, 286, 448
 - local authorities which are, 286, 287
 - powers of, 285, 286
- trading, contracts of, 452, 453
- vicarious liability of, 437

CORRUPT AND ILLEGAL PRACTICES,

- disqualification for, 105, 115-117
- prosecution for, 115

COSTS,

- assizes, of, payment of, 240, 244, 246, 247 *n*.
- criminal cases, in, payment of, 244, 247 *n*., 250 *n*.
- justices, of, payment of, 244
- local inquiries, of, 344, 350
- petty sessions, of, payment of, 240, 247 *n*.
- Public Authorities Protection Act, 1893, under, 461
- quarter sessions, of, payment of, 240, 244, 247 *n*., 250 *n*.

COUNCILLORS,

- absence of, effect of, 107, 108
- borough. *See* BOROUGH COUNCILLORS
- ceasing to be qualified, 107
- county. *See* COUNTY COUNCILLORS
- death of, 107
- disqualification of, 101-106
- election of. *See* ELECTION
- partial renewal of, 90
- qualifications of, 100
- resignation of, 107
- retirement of, 50, 60, 90
- retiring, when re-elected, 111
- term of office of, 50, 60, 88, 90, 92, 93

COUNCILS,

- assigned revenue grants of, transfer of, 176
- committees, appointment of and control over, 135-138, 147-149
- delegation by, 140, 148 *n*.
- incorporated, 60, 282
- increase in size of, 133
- meetings of. *See* MEETINGS
- See also* BOROUGH COUNCIL ; COUNTY BOROUGH COUNCIL ; COUNTY COUNCIL ; RURAL DISTRICT COUNCIL ; URBAN DISTRICT COUNCIL

COUNTIES OF CITIES AND TOWNS,

- administration of justice in, 245, 248-252
- county, relations with, 61, 245
- former position of, 58, 242
- independence of, 242
- present position of, 245
- privileges of, retention of, 59
- sheriffs of, appointment of, 103, 242

COUNTY,

- administration of justice in, 243-245
- alteration of area of, 73-76
- apportionment, general exchequer grants, of, 185, 187

Index

COUNTY—*continued.*

- borough and, relations between, 246, 247
- colleges, purpose of, 724
- county borough, relation with, 31, 36, 62, 63
- creation of, 9, 73, 74
- division of, 10, 15, 35, 36, 56, 73, 76, 79, 241
- electoral areas of, 79, 80, 97
- history of, 9-12, 15, 19, 31, 32, 240, 243, 244
- local authorities within, relation between, 41
- lord lieutenant of, appointment of, 56
- petty sessional divisions of, 56, 241

COUNTY BOROUGH,

- administration of justice in, 62, 247
- administrative county, when excluded from, 52
- alteration of areas of, 73, 76
 - parishes by, 83
- apportionment, general exchequer grants, of, 185, 187
- composition of, 83
- county district, inclusion of, in, 76
 - rate, exemption from, 246
- creation of, 31, 62, 63, 73, 74, 76, 85, 173
- financial relations with county of, 246, 247
- minimum population for, 63
- non-county borough becoming, 76
 - distinguished from, 41, 62
- qualification to become, 63, 74, 76
- union with county of, 73, 76

COUNTY BOROUGH COUNCIL,

- exchequer grants of, 185, 188
- licence duties collected by, 178 *n.*, 179 *n.*
- poor law authority, as, 267 *n.*, 343
- powers of, 32, 35, 41, 62, 83
- registration of births and deaths transferred to, 32

COUNTY COUNCIL,

- administrative work of quarter sessions, transfer of, to, 31, 52, 54,
243, 244
- alteration of areas by, 54, 82-84, 97
- annual budget of, preparation of, 198
- body corporate, is, 60, 282
- boroughs, relation with, 62, 245, 246 *n.*, 248, 249
- bye-laws, power to make, 215, 216, 217
- clerk. *See* CLERK
- composition of, 52, 53
- compulsory purchase of land by, 228, 229
- contribution to expenses of other authorities by, 168, 493, 506, 533,
538, 753, 757
- control exercised by, 45, 48, 54, 82-84, 141, 142, 192, 365-367
- coroner, appointment of, 57
- creation of, 32, 52, 173, 468, 490
- default powers of, 361-366, 533, 565, 593, 635, 636
- delegation by, committees, to, 140
 - district council, to, 52, 142, 592
 - to, highway functions, of, 593
- education officer, appointment of, 56, 124

Index

COUNTY COUNCIL—*continued*.

- elections to, date of, 109
 - order for holding, 367, 386, 387
- exchequer grants of, 185, 187, 188
- hospitals, provision of, 512
- income of, 161, 162
- meetings of, business transacted at, 129
 - standing orders governing, 213 *n*.
- members of, classes of, 53
- officers of, appointment of, 55, 56, 124
- police authority, as, 54
- poor law authorities, as, 343
- precepting authority, as, 164
- promotion or opposition of legislation by, 298, 299
- public health functions of, 490, 492
- registration of births and deaths transferred to, 32
- returning officer of, 109
- standing joint committee, relation with, 139, 648
- statutory corporation, is, 286

COUNTY COUNCILLORS,

- absence of, effect of, 107, 108
- aldermen, election as, 108
- appointment of, 109
- death of, 107
- election of, 53
- number of, 53
- refusing office, liability, 114
- resignation or retirement of, 53, 90, 91, 107
- term of office of, 53, 90, 92, 93
- travelling expenses of, 239
- voting, disqualification from, 165 *n*.

COUNTY COURT (ANCIENT),

- composition of, 10, 240
- decline in power of, 16
- replacement of, 19

COUNTY COURT (MODERN),

- appeal to, closing order, from, 399, 435, 523
 - demolition order, against, 399, 435, 522, 523
 - notice requiring repairs, against, 399, 435, 522
 - registration officer, from, 94
- river pollution, proceedings for, in, 623

COUNTY DISTRICT,

- alteration of boundaries of, 74, 76, 79, 82, 83
- creation of new, 77
- defined, 50 *n*.
- division of, 49, 76, 79
 - into wards, 82
- union of, 76
 - under Public Health Act, 492

COUNTY FUND,

- accounts of, provisions for keeping, 165, 198
- order for payment out of, 199
 - appeal against, 199, 386, 400

Index

- COUNTY FUND,
penalties payable to, 244 *n.*, 251 *n.*
sums payable out of, 244, 244 *n.*, 247 *n.*, 251 *n.*, 298, 299
treasurer, duty of, 199
- COUNTY ROADS,
appeal to Minister of Transport as to, 408, 592
bridges in, 614
maintenance of, 591
- COUNTY SCHOOLS,
establishment and classification of, 699
maintenance of, 699
primary, managers for, appointment of, 710
religious instruction in, 699, 700
- COUNTY VALUATION COMMITTEE,
appointment of, 162
executive functions of, 162
valuer, appointment of, by, 162
- COURT LEET,
constables appointed by, 12, 640, 641
disuse of, 16
nuisances, jurisdiction over, 481
- COURT OF ALDERMEN,
composition of, 259
officers elected by, 260
- COURT OF COMMON COUNCIL,
composition of, 260
powers and duties of, 260
- COURT OF COMMON HALL,
composition of, 259
- COURT OF REFEREES ON PRIVATE BILLS,
constitution of, 305 *n.*
reference to, 305
- COURTS,
appeal to, adjudication on nomination paper, from, 111
administrative decisions, from, 397, 412
delegated legislation, from, 333-335
bye-laws, control over, 320-323
delegated legislation, control over, 322-335, 407
tabled orders, 386
discretion of, control over exercise of, 413, 414
judicial functions of administrative bodies, control over, 412-436
local government and, 369-371, 373-377
formerly carried on by, 240-242, 369, 370
supersession of, administrative justice, by, 406
- CREDITORS,
composition with, disqualification for, 104
- CRIME,
conviction for, disqualification for, 105
- CROWN,
remedies against, 371-373
servant, liability of, 372, 373

Index

- CUL-DE-SAC*,
nature of, 570
- CUMULATIVE VOTE,
principle of, 698 *n.*
- CUSTOS ROTULORUM*,
meaning of, 57

D

- DAMAGES,
action for, in respect of judicial functions, 413
local authorities liable in, 374
Public Authorities Protection Act, 1893, recoverable under, 458-461
rate to pay, making of, 374 *n.*, 392
- DEATHS,
members of local authority, of, 107
registration of, 32 *n.*
- DEBENTURE,
loan by, 193
- DECLARATION,
action for, Public Authorities Protection Act, 1893, within, 458
when available, 375, 376, 379-383, 413
- DEDICATION. *See* HIGHWAYS
- DEFAMATION,
council meetings, at, 130
reports of meetings, in, 130
- DEFAULT POWERS,
county council, of, 361, 362, 365, 366, 565, 593
education, over, 362, 363
fire brigades, over, 664
highways, over, 364
housing, over, 362, 533
land drainage, over, 630
planning, over, 363, 552, 565
poor law, over, 345, 364
public health, over, 361, 362, 364, 493, 494
rural housing, over, 362, 533
- DEFENCE,
opportunity to make, 416, 417, 421
- DELEGATED LEGISLATION,
advantages of, 318-320
appeal to courts from, 333-335
central control by, 319, 342, 343, 348, 349
clauses giving statutory effect to, 327-330
control by courts over, 322-335, 396
derivation from statute of, 321
practical disadvantages, 322-325
procedure in making of, 325-327, 336
publication of, 337

Index

DELEGATED LEGISLATION—*continued.*

- review of, 333
- Rules Publication Act, 1893, and, 335-337
- statutory effect, time for obtaining, 330, 331
- tabling of, 325-327
- ultra vires*, 322, 323
- validity of, 321-335, 403

DELEGATION,

- borough council, to, highway functions, of, 593
- committees, to, 140, 141, 148
- county council, by, limitation on, 52 *n.*
 - to, highway functions, of, 593
- district council, to, county council, by, 52, 142
 - highway functions, of, 590, 592, 593
- housing management commission, to, 532
- joint committees, to, 144
- library committee, to, 734
- Minister of Transport, by, highway functions, of, 593
- non-county borough, to, highway functions, of, 592
- parish council, to, 48, 143
- parochial committee, to, 142, 143
- rural district council, to, highway functions, of, 592
- sub-committee, to, 140
- urban district council, to, highway functions, of, 592, 593

DELEGATUS NON POTEST DELEGARE,

- application of maxim, 140

DEMAND NOTE,

- rates, for, 168, 169

DEMOLITION ORDERS,

- appeal against, 434, 435, 522, 523
- Housing Acts, under, 434

DE-RATING,

- agricultural land and buildings, of, 157
- effect of, 171, 178
- industrial hereditaments, of, 157
- purpose of, 169, 170

DERWENT VALLEY WATER BOARD,

- creation of, 146, 477

DESTITUTION,

- relief of, administration of, 5, 678-680

DEVELOPMENT PLANS,

- educational, 727

DIRECTOR OF PUBLIC PROSECUTIONS,

- election petition, representation on, 117
- prosecution for disability by, 123 *n.*

DISABILITY,

- interest, arising from, effect of, 420
 - penalty for acting under, 123
- removal of, 123
 - parish councillor, from, 122 *n.*, 367
- statutory orders governing, 213 *n.*

Index

- DISCRETION,
control by courts of, 413, 414
- DISEASES,
infectious, 511
- DISINFECTION,
provision for, 511
- DISMAINING,
provisional order for, 590
- DISQUALIFICATION,
borough auditor, of, 102
coroners, of, 102
election, for, 104, 105
corrupt and illegal practices, for, 105, 106, 115, 117
interest, for, 101, 122
office of profit, for holding, 102, 103
penalty for acting under, 119, 120
poor relief, for receipt of, 104, 105
proceedings for questioning, 115-120, 376, 387-389
surcharge, by, 105, 207, 208
justices, of, licensing, for, 793
member of local authority, of, casual vacancy on, 107
public assistance officers, of, 102 *n.*
- DISTRESS COMMITTEE,
unemployment, for, 473
- DISTRESS WARRANT,
rates, for, 169
surcharge, for non-payment, of, 207
- DISTRICT BOARDS,
Metropolis, in, 257, 258
- DISTRICT COUNCIL,
accounts of, provision for keeping, 196, 197
body corporate, as, 50, 60
borough council, modelled on, 468
incorporation as, 68
composition of, 50
committees of, 136
corporate body, is, 50
county council, relation to, 82, 367
delegation to, county council, by, 52
elections to, 50, 109
functions of, 51, 52
highway powers of, delegation of, 140
transfer of, 51
history of, 49
housing authority, as, 520
meetings of, number of, 50
officers of, appointment of, 51, 124
powers of, 35
relinquishment of, 142, 493, 533
property valuation by, 51
rating authority, as, 51
returning officer of, 109
statutory corporation is, 286

Index

- DISTRICT COUNCILLORS,
absence of, effect of, 107, 108
death of, 107
election of, 50
 suspension of, 50 *n.*, 92
refusing office, liability, 114
resignation of, 107
retirement of, 50, 90, 91
term of office of, 50, 90, 92, 93
- DISTRICT MEDICAL OFFICER (POOR LAW),
records and particulars furnished by, 682
- DIS-TURNPIKED ROADS,
bridges in, 611
main roads, becoming, 589, 590
- DIVERSION OF HIGHWAY,
grounds for, 580
proceedings for, 579-581
 consent to, 593
- DOCKS,
rateable value of, 157, 158
- DOGS,
licence duty for, assigned revenue, as part of, 773
 collection of, 128 *n.*
- DRAINAGE BOARDS,
annual report of, 635
bodies corporate, are, 632
internal, alteration of areas of, 634
 appointment of, 631
 duties and powers of, 632, 634
returns to Minister of Agriculture and Fisheries of, 635
- DRAINAGE DISTRICT,
Act of 1918, under, 629
internal, area of, 632
- DRAINS,
combined, 504, 505
construction of, 508, 509
provision of, 503, 509
repair of, 503, 504, 508
sewers, connection with, 507, 508
single private drain, 504
- DRIFTWAYS,
highways, are, 571
- DRINKING FOUNTAINS,
streets, in, provision of, 607
- DRIVERS' LICENCES,
goods vehicles, of, 778
mechanically propelled vehicles, of, 774
public service vehicles, of, 776
- DRUGS. *See* FOOD AND DRUGS
- DUSTBINS,
provision of, 509, 607

Index

DUTY,

- discretionary, 390
- judicial, 394-397
- ministerial, 390, 394, 396
- performance of, 374
- public, enforcement of, 376, 389, 390, 444
 - Public Authorities Protection Act, 1893, within, 456, 457
- statutory, contract not to perform, 448, 449
 - duty to perform carefully, 444
 - estoppel as affecting, 449 *n.*
 - failure to perform, 374, 383, 384, 390, 443-447
 - tortious liability in performing, 441-447

DWELLING-HOUSE,

- cleansing of, 509
- removal of refuse from, 509
- sanitary accommodation in, 500, 502, 509
- water supply to, provision of, 753

E

EARTH CLOSETS,

- cleansing of, 509

EDUCATION,

- acquisition of land for, 227 *n.*
- central control over, 30, 341, 347, 350 *n.*, 352, 362, 363
- committees, appointment of, 136, 705
 - audit of accounts of, 202 *n.*, 208
 - library, powers of, 734
- default powers over, 362, 363
- development plans, 726, 727
- elementary, advanced instruction in, 722, 723
 - ages when compulsory, 701, 715-717
 - blind children, of, 715, 716
 - boarding facilities for, 720, 721
 - bye-laws for, 701
 - compulsory attendance for, 701
 - conscience clause in, 698
 - co-ordination with secondary of, 704
 - deaf children, of, 715, 716
 - defective children, of, 715-717
 - duty to maintain schools for, 708, 709
 - epileptic children, of, 715-717
 - extension of scope of, 714-724
 - grants in aid of, 694, 700, 728-730
 - history of, 693-704
 - local authorities for, 32, 704
 - managers of schools for, 708-710
 - medical inspection and treatment in, 695, 718-720
 - milk and meals for scholars, provision of, 695, 717
 - non-provided schools for, 697, 698, 707-711
 - play centres for, 723
 - provided schools for, 697, 698
 - religious instruction, choice of, 699, 700, 710
 - scholarships for, 722, 723

Index

EDUCATION—*continued.*

- elementary, school attendance bye-laws for, 701
 - fees for, 702
 - teaching of religion in, 698, 708
 - travelling facilities for, 720, 721
 - vacation schools for, 723
 - voluntary hospital for, 695, 698
 - schools for, 695, 696, 702, 703
- expenses of, 727, 728
- further, 694, 695, 724-726
- grants-in-aid of, conditions of, 179, 352
 - deficiency, 729
 - nursery schools, in, 723
 - percentage, 177, 729
 - rate formula for, 730
 - special schools, in, 716
- higher, continuation schools for, 724
 - co-ordination of, 704, 725
 - limit of expenditure on, 725
 - local authorities for, 704
 - scholarships for, 725
 - schools for art and science, 735
 - surveys of, 725
- history of, 693-704
- holiday camps for, 720, 737, 738
- inspections of, 350 *n.*, 696
- joint committees for, 707
- local authorities for, elementary schools, duty as to, 446
- managers, joint body of, 708
- medical inspections and treatment for, 695, 718-720
- Metropolis, in, conduct of, 262
- nursery schools for, 723, 724
- physical training in, 695, 720, 735
- primary, 694
- public, supervision of, 38
- recreation, provisions for, 695, 727
- reforms for, 694, 695
- school leaving age, raising of, 695
- secondary, 694
- supervision of, 38
- swimming baths, etc., for, 720, 735
- universities, grants to enter, 695

ELECTION,

- aldermen, of, borough, 61, 88, 113
 - City of London, 259, 260
 - county, 53, 61, 88, 113
- chairman, of, county council, of, 53, 88
 - district council, of, 50, 88
 - parish council, of, 46, 88
 - meeting, of, 45
 - rural district council, of, 50, 88
 - urban district council, of, 50, 88
- common councilman of City of London, of, 260
- councillors, of, ballot, by, 112
 - borough, 60, 90

ELECTION—*continued.*

- councillors, of, county, 53, 90
 - district, 50, 90
 - metropolitan borough, 264
 - parish, 45, 90, 112
 - poll, when necessary, 112
 - rural district, 50, 82, 90
 - urban district, 50, 90
- direct, 88
- elective auditors, of, 209
- indirect, 88
- Lord Mayor of London, of, 259
- mayor, of, 61, 88
- Metropolitan Board of Works, of, 258
- offences, disqualification produced by, 105, 115, 117
 - prosecution for, 115, 117
- parish councillors, of, 45
- petition. *See* PETITION
- qualifications for, 99, 100
- Recorder of London, of, 260
- Sheriffs of London, of, 259

ELECTION RULES,

- election offences under, 114
- returning officers under, 109

ELECTIONS,

- annual and triennial, 90
- ballot at, 112
- casual vacancies, for, 106-108
- challenging of, 115, 117, 387-389
- conduct of, 106-113
- dates of, 109
- declarations, failure to make, liability, 115
- failure to hold, 367, 386, 387
- grounds for avoiding, 116-118
- method of holding, 111, 112
- order for holding, 386, 387
- poll, when necessary, 112
- returns, failure to make, liability, 115
- validity of, 115, 116, 387-389
- voting rights at, 93, 94

ELECTIVE AUDITORS. *See* AUDITORS

ELECTORAL AREAS,

- borough, for, 97
- county, of, 79, 80, 97
- district council, for, 82, 83, 97
- overlapping of, 97
- parishes, for, 97

ELECTORS,

- council, relation to, 149, 150
- minutes, inspection of, 129
- qualification as, 95, 96
- register of, 94, 95

ELECTRICITY,

- areas of supply for, 764, 766, 767
- Central Electricity Board, 469, 770, 771

Index

ELECTRICITY—*continued.*

- charges for, 765
- districts, 768
- expenses of, 152, 765
- generation of, 764, 766-771
- grid, the, 770
- history of, 469, 763-769
- joint electricity authorities for, 146, 478, 768, 769
 - schemes for, 768
- Minister of War Transport's control over, 39
- power companies, 766, 769
- pre-emption of undertaking for, right of local authorities, 765, 766
- supply, Clauses Act for, 766
 - control by local authority, 765, 768
 - licence, under, 764
 - local authorities, by, 770
 - provisional order, under, 765
 - undertakers, powers and duties of, 765, 767

ELECTRICITY COMMISSIONERS,

- accounts of, 768
- powers and duties of, 146, 766-770
- public corporation, as, 5
- sanctions to loans by, 769

EMPLOYMENT,

- children, of, age for, 721, 722
- exchanges, centrally administered services, as, 4
- local authority, of one, by another, 142

EQUALISATION FUND, 266

EXCHANGE,

- acquisition of land by, 227, 228
- corporate land, of, 237
- land, of, local authorities, by, 237, 238

EXCHEQUER CONTRIBUTION ACCOUNT,

- grants paid from, 176

EXCHEQUER GRANTS,

- additional, purpose of, 188
- adjustments of, alteration of areas, on, 85
- Metropolis, in, 266-268
- See also* GENERAL EXCHEQUER GRANTS ; SUPPLEMENTARY EXCHEQUER GRANTS

EXCISE LICENCES,

- history of, 781
- restrictions on grant of, 783, 784

EXPENSES,

- aerodromes, on, 771
- boroughs, of, payment of, 197, 198, 493
- catchment boards, of, 634, 636
- City of London police, of, 657
- county councils, of, rating for, 165, 168
- education, on, 727, 728
- electricity supply, on, 765
- general county purposes, for, 165
- highways, on, 592
- housing, on, 534-539

Index

EXPENSES—*continued*.

- joint board, of, 145, 146, 492
 - committees, of, 145, 408, 477
- land drainage, on, 634
- libraries, on, 731, 732, 734
- light railways, on, 763
- markets, on, 750
- metropolitan police, of, 656
- police, on, 661, 662
- poor law, on, 674
- public health, of, 493
- rural district councils, of, 167, 196, 493
 - parishes, of, 197
- school boards, of, 700, 701
- special county purposes, for, 165
- tramways, on, 762
- travelling, 239
- urban district councils, of, 196, 493

EXTRAORDINARY TRAFFIC,

- liability for, 594 *n*.

F

FACTORY,

- rateable value of, 157

FAIRS,

- abolition or alteration of days of, 746

FINANCE,

- central control over, 350-360
- excessive and unreasonable expenditure, control over, 357
- expenses, payment of, 196, 197
- grants in aid, 170-190
- local authorities, income of, 151-153, 178
- property, income from, 151, 152
- safeguards in respect of, 195, 196

FINANCE COMMITTEE,

- composition of, 135, 137
- functions of, 148, 165, 198

FINES,

- borough constables, on, 650
- office, for failure to accept, 113, 114
- treasurer, payment to, of, 244 *n*., 250 *n*., 251 *n*.

FIRE,

- alarms in streets, 665
- hydrants, 665

FIRE BRIGADES,

- charges for, 664
- co-ordination of, 663, 664
- default powers over, 664
- Metropolis, in, control of, 258

FIRE SERVICE BOARD,

- transfer of functions to, 664

Index

- FIRE SERVICE COMMISSION,
 - purpose of, 664
- FIREMEN,
 - police employed as, 663
 - powers of, 663, 664
- FISHERIES,
 - conservators of, appointment of, 618, 619
 - inspectors of, appointment of, 618
 - overseers of, appointment of, 618
 - poisoning waters of, 618
- FISHERY BOARDS,
 - bodies corporate, are, 620
 - bye-laws, power to make, 620
 - creation and composition of, 619, 620
 - powers of, 620
 - rivers pollution proceedings by, 624
- FISHERY DISTRICTS,
 - establishment of, 619
- FIXED GRANT PERIOD,
 - extent of, 181
- FOOD AND DRUGS,
 - adulteration, 496-498
 - authorities, duties of, 497
 - examination of, 496
 - unsound, 496
- FOOD CONTROL COMMITTEES,
 - appointment and approval of, 7
- FOOTPATHS,
 - highways, are, 571
 - repair of, 593
- FRANCHISE,
 - creation of, 744
 - electoral, 94-96, 98
 - parliamentary, peers, in case of, 95 *n.*
- FRANKPLEDGE,
 - system of, 10, 638, 639
- FREEMEN,
 - borough, of, former position of, 237
- FREIGHT-TRANSPORT HEREDITAMENTS,
 - de-rating of, 157, 158

G

- GAME,
 - licence duty for, assigned revenue, as part of, 773
 - collection of, 178 *n.*
- GAOL DELIVERY,
 - commissions of, issue of, 241
- GARDEN CITIES,
 - acquisition of land for, 564, 565

Index

- GAS, SUPPLY OF,
adoption of Lighting and Watching Act for, 756
duty to provide, 758
history of, 469, 756, 757
provisional order for, 757
purchase of undertaking for, 757
special order for, 757
- GENERAL ANNUAL LICENSING MEETING,
purpose of, 785
- GENERAL BOARD OF HEALTH,
central control over, 340
creation and composition of, 39, 486
duties and powers of, 486, 487
- GENERAL DEVELOPMENT ORDER,
planning scheme, under, 563
- GENERAL EXCHEQUER CONTRIBUTION,
creation of, 182
distribution of, metropolis, in, 267, 268
- GENERAL EXCHEQUER GRANTS,
apportionment of, 185
City of London, of, 267
county borough councils, of, 185
councils, of, 185, 187
district councils, of, 185
Metropolis, in, 266-268
metropolitan borough councils, of, 267
reduction of, 357, 358
rural district councils, of, 187
urban district councils, of, 187
- GENERAL RATE, 155, 156, 493
- GENERAL RATE FUND,
borough, of, costs of promotion of or opposition to legislation charged
to, 297, 298
order for payment out of, 198, 289, 386, 400
rents and profits, transfer of, to, 237
salaries paid out of, 198 *n.*, 251
surplus in, application of, 291, 297
county borough, of, costs in criminal cases, payment of, out of, 247
rural district council, of, costs of promotion of or opposition to legis-
lation charged to, 298
provision for keeping, 196, 197
urban district council, of, costs of promotion of or opposition to legis-
lation charged to, 298
provision for keeping, 196
- GIFTS,
local authorities, by, effect of, 203 *n.*
power to accept, 238, 349 *n.*
- GOODS VEHICLES,
licensing of, 777-779
- GRANTS-IN-AID,
Additional Exchequer, 188, 268
adjustment of Exchequer, 85, 320

Index

GRANTS-IN-AID—*continued.*

aided schools, for repair of, 712
assigned revenues, by, 173-178
block, 178, 181-188
central control over, 176-179, 351-359
conditional on efficiency, 171, 173, 174, 176, 177, 351
distribution of industry, of, 567
earmarked, 171, 173, 177
education of. *See* EDUCATION
General Exchequer, 181-187, 266-268
health services, of, 177, 181, 189, 567
history of, 171-178
housing, of, 152 *n.*, 177, 179, 180, 352, 472 *n.*, 531, 533-538, 567
increase of, 170
land drainage of, 635,
light railways, of, 763
lighting, of, 567
medical officers of health, of, 176, 353-356
midwives, of, 181, 189, 357 *n.*
nursery schools, of, 723
physical training, for, 737
police, of, 173, 176, 177, 179, 181, 351, 352, 647, 650, 652, 653, 655-657, 662
reasons for introduction of, 171, 172, 189
recreational facilities, of, 189, 515, 737
redevelopment, of, 537
reduction or withholding of, 351-358
roads, of, 177, 180, 181, 579, 590, 592, 605
sanitary officers, of salaries of, 176, 353-356
small holdings, of, 177, 181
special agreement schools, for repair of, 712
Supplementary Exchequer, 188, 268
unemployment relief works, of, 474

GREATER LONDON,

government of, proposed reforms in, 268

GRID,

system, 770

GROUPING ORDERS,

county council, by, 45

GUARDIANS COMMITTEES,

composition and duties of, 677, 681
public assistance committees, relation to, 677, 678

GUARDIANS OF THE POOR,

abolition of, 32, 342, 670-673
creation of, 28, 484, 670
grants-in-aid of, 176
Metropolis, in, 257, 265
public health functions of, 31, 49, 488, 489
transfer of functions to, 257, 342

GUNS,

licence duty for, collection of, 178 *n.*

GYMNASIUMS,

provision of, 515, 737

Index

H

HABEAS CORPUS,

writ of, application of, 385

HALLS,

power to provide, 227 *n.*

HEAD CONSTABLE,

hundred, of, appointment of, 640
chief pledge, relation to, 640

HEALTH,

central control over, 39
service, proposals for, 37
visitors, grants in aid of training of, 181

HEDGES,

streets or footpaths, overhanging, removal of, 608

HEREDITAMENTS,

agricultural, de-rating of, 157
assessment of, 154-163
industrial, de-rating of, 157

HIGH CONSTABLE,

hundred, of, appointment and duties of, 10, 640, 641, 642

HIGH COURT,

appeal to, case stated, by, 400
clearance order, from, 400, 526, 527
compulsory purchase order, from, 234 *n.*, 235, 400, 428, 526,
527
delegated legislation, from, 333
district auditor, from, 205-208, 386, 400
payment out of borough general rate fund, against, 198, 289,
386, 400
county fund against, 199, 400
planning scheme, from, 562
ordering holding of election by, 386, 387
qualification, proceedings respecting, as, 120, 388, 389
river pollution, proceedings for, in, 623

HIGHWAY BOARDS, 28, 488, 587, 588

HIGHWAY DISTRICTS,

creation of, 488, 587, 588

HIGHWAYS,

ad hoc authorities for, 25, 585, 586, 588
adoption of, 595, 596, 599-601
authorities, 589, 593, 594
history of, 581-593
breaking up of, 572
bridges over, right to erect, 572, 741, 742
central control over, 39, 341, 357, 364 *n.*
compulsory purchase for, 606
county councils as authorities for, 54
creation of, 575-579

Index

HIGHWAYS—*continued*.

- dedication and acceptance of, 575-578
 - effect of, 595, 596
 - obstruction, subject to, 571
- diversion of, 579, 580, 593
- excavations under, 572
- failure to repair, liability for, 384, 446, 584, 594
- grants in aid of, 177, 180, 181, 590, 592, 605
- level crossings over, 759
- lighting of, 48, 444, 553, 606, 756, 757
- maintenance of, Metropolis, in, 256
- Minister of Transport's control over, 39, 357, 408, 409, 592, 604
- misfeasance as to, liability for, 446, 447, 594
- nonfeasance as to, liability for, 446, 447, 594
- obstruction of, remedies for, 380, 381, 384, 572
- ownership of soil of, 571-573
- public health, relation to, 547, 569, 570, 596
 - rights in, 570-573
 - user of, 575-578
 - utilities, interference by, with, 572, 741, 742
- rates, 540, 583-585, 587
- repair of, history of, 17, 18, 24, 581-593
 - liability for, 384, 446, 447, 594
 - railway or canal bridge over, 616
 - ratione clausurae*, 582, 595
 - tenurae*, 582, 595
 - tramway undertaking, by, 760
- repairable by inhabitants at large, 594-596, 599-601
- ribbon development, restriction of, 574, 575, 604, 605
- right of access to, 380, 411, 419, 573-575, 605
- stopping up of, 579-581, 593
- street refuges, liability for defective state of, 447
- streets. *See* STREETS
- telephone wires over, right to erect, 572
- traffic studs, liability for defective state of, 447
- tramways on, 759, 760
- trespass upon, 572, 573
- vesting in local authorities of, 573

HOBHOUSE'S ACT,

- effect of, 257

HOLIDAY CAMPS,

- provision of, 720, 737, 738

HOME OFFICE,

- central department, as, 38

HOME SECRETARY,

- air-raid precautions, functions of, 476, 662
- appeal to, alteration of wards, as to, 82
 - constable, by, 409, 659
- borough wards, alteration of, by, 81
- bye-laws, confirmation of, by, 215, 218, 219
- chief constable, approval of, 647, 651
- county electoral areas, alteration of, by, 79, 80
- Election Rules of, 106
- fire-brigade functions of, 664

Index

HOME SECRETARY—*continued*.

- inspection of police forces by, 350 *n.*, 352, 652, 653
- local inquiry by, alteration of areas, on, 80, 81
- metropolitan police authority, is, 255, 271, 643, 655, 656
- petition to, alteration of borough wards, as to, 81
- police powers of, 38, 39, 173, 179, 255, 271, 348 *n.*, 351, 352, 645-648, 651-654, 656, 657, 661
- public health functions of, 40, 487
- rural district wards, alteration of, 82, 83
- urban district wards, alteration of, 82

HOSPITALS,

- authorities, liability of, 438, 439
- county council, contribution by, to, 168, 493
- isolation, provision of, 512
- poor law, provision of, 675, 683
- provision of, 511, 512
- voluntary, co-ordination with, 512

HOUSE COMMITTEE,

- poor law institution, of, appointment and duties of, 684
- care of children, 686

HOUSING,

- acquisition of land for, 227 *n.*
- authorities, 520
- bye-laws, 521
- central control over, 352, 362
- clearance areas, 400, 421, 523-527
- closing orders, 415, 425, 433, 434, 523
- compensation in, 523, 527, 528
- compulsory purchase orders, 400, 421, 525
- default powers over, 362, 366, 533
- demolition orders, 400, 417, 434, 522, 523
- Equalisation Account, 539
- ex gratia* allowances, 523, 528, 529
- grants in aid of, 152 *n.*, 177, 179, 180, 352, 472, 531, 533-538, 567
- guarantees for, 531
- history of, 433-435, 471-473, 516, 520
- housing associations, 531
 - management commissions, 532
- individual unfit houses, 520-522
- local authorities' contributions, 533, 538
- lodging houses for artisans, 517
- Metropolis, in, control of, 262
- new houses, provision of, 472, 473, 530-534, 535, 536
- overcrowding, 530, 537
- planning, relation to, 545, 547
- re-conditioning, 531, 533, 534
- re-development, procedure on, 529, 530, 537
- re-housing, 482, 484, 486, 491, 493, 497-503, 531
- rents, 540
- repairs account, 539
 - order as to, 400, 435, 522
- revenue account, 538, 539
 - disposal of surplus of, 152, 539
- rural, county council contributions for, 533
 - transfer to, 362, 366, 532, 533
- grants in aid of, 533, 534

Index

HOUSING—*continued.*

slum clearance. *See* SLUM CLEARANCE
small dwellings acquisition, 540
subsidies for, 473, 531 *n.*
unfit houses, 435, 520-530
unhealthy areas, 481-487, 497-503, 523-530
unification of conditions, 540
war legislation as to, 519, 520
warranty of fitness, 520

HUE AND CRY, duty to raise, 639

HUNDRED, constables of, 640-642 court, 10, 11, 16 government of, 10 high constable of, institution of, 10 public duties of, 10, 639, 640, 642 repair of bridges by, 610 riot, liability for, 10 robbery, liability for, 10, 639, 642

HYPOTHETICAL TENANT, assessment of, 155, 156

I

ILLEGAL PRACTICES, disqualification for, 105, 115, 117 prosecution for, 115

IMPROVEMENT COMMISSIONERS, appointment of, 24 lighting duties of, 750 supersession of, 486 urban sanitary authorities, as, 31, 49, 489

INDUSTRIAL HEREDITAMENTS, de-rating of, 157

INDUSTRY, distribution of, acquisition of land for, 567 authority for, 567 development areas for, 567 grants or loans for, 567

INFECTIOUS DISEASES, hospital accommodation for, 142, 512 notification of, 511 preventing spread of, 511

INFRINGEMENT, private rights, of, remedies for, 375, 376, 380-382 public rights, of, remedies for, 375, 376, 379-383

INJUNCTION, action for, Public Authorities Protection Act, 1893, within, 458 supersession of, 376 *n.* bye-laws, to restrain breach of, 223

Index

INJUNCTION—*continued.*

enforcement of, 382

quia timet, Public Authorities Protection Act, 1893, within, 458

quo warranto, replacing, 376 *n.*, 385, 387

when available, 195, 196, 285, 286, 375, 376, 379-383, 388, 389, 413

INNS,

nuisances, as, 780

INQUIRIES. *See* LOCAL INQUIRY

INSPECTION,

borough accounts, of, 198, 209

bye-laws, of, 218

central control by, 344, 349, 352, 696

county council accounts, of, 202

housing accommodation, of, 522

poor law institutions, of, 684

INSPECTORS,

constabulary, of, appointment of, 352, 652, 654

reports of, 652

fisheries, of, appointment of, 618

lighting and watching, of, 756

Poor Law, of, 344

Public Health, duties of, 486

powers of, 350

schools, of, 696

INSURANCE,

centrally administered service, as, 4

INTEREST,

disclosure of, member of local authority, by, 123

officer of local authority, by, 128

member of local authority, of, disability produced by, 101, 122, 123

removal of, 123, 367

officer of local authority, of, 128

INTERIM DEVELOPMENT,

compensation in case of, 560

control of, power to enforce, 560

limited period, for, 559

order, appeal against refusal of, 558, 559

application of, 558

noncompliance with, penalty, 560

INTOXICATING LIQUORS,

licensing of sale of, 19, 780-793

IRREMOVABILITY,

effect of, 689

status of, 688

ISOLATION HOSPITALS,

provision of, 512

J

JOINT ADVISORY WATER COMMITTEES,

control of, 751

Index

JOINT BOARDS,

- bodies corporate, as, 145
- composition of, 145
- county and county borough councils, of, 146, 493
- education, for, 146 *n.*
- joint committees, distinguished from, 145
- expenses of, 145, 146, 492
- joint electricity authorities, 146
- Minister of Health, creation by, 146
- planning schemes, for, 146, 477
- powers and duties of, 145, 146
- public health purposes, for, 146, 477
- united district, for, 146, 477, 492
- water supply, for, 146, 752

JOINT COMMITTEES,

- appointment and composition of, 143, 144
- delegation to, 144
- education, for, 707, 708
- expenses of, 145, 408, 477
- Metropolis, in, application of Local Government Act, 1933, to, 254 *n.*
- officers of, interest of, 128
- planning, for, 37 *n.*, 408, 477 *n.*, 552
- poor law, for, 147, 344, 673, 685
- public health, for, 492
- purpose of, 143
- rivers pollution prevention, for, 624

JOINT ELECTRICITY AUTHORITIES,

- compensation of, order for, 768

JOINT HOSPITAL COMMITTEE,

- replacement of, 147 *n.*

JUDICIAL CONTROL,

- administrative tribunals, over, 396, 412-416
- bye-laws, over, 221-224
- central departments, over, 390, 391, 396, 397, 400
- compulsory purchase orders, over, 233, 235, 400
- defects of, 22, 23, 368
- delegated legislation, over, 322-335, 396
- derivation of, 278
- discretionary powers, over, 413, 414
- exclusion of, 324-334, 406, 407, 428, 429
- history of, 21-23, 369-371, 405
- importance of, 279, 280, 368
- judicial functions, 370, 412-436
- justices of the peace, over, 22
- limits of, 374-377, 396, 405, 406, 413, 414, 419-422
- means of exercising, 375-377, 378, 379
- ministerial powers, over, 414
- nature of, 255, 256, 279
- scope of, 405, 406, 419-429, 435, 436

JUDICIAL FUNCTIONS,

- definition of, 370, 394-396
- executive, of, 371, 396, 397, 407-413
- judicial control over, 22, 412-436

Index

JUDICIAL FUNCTIONS—*continued*.

- judicial control over, exclusion of, 324-334, 406, 407, 428, 429
- limits of, 413, 414, 419-436
- justices of the peace, of, 22, 370
- local authorities, of, 371, 397
- methods of controlling, 22, 376, 377, 412
- rules governing exercise of, 412-436
- of natural justice in, 415-419

JUDICIAL POWERS,

- administration, relation to, 369, 407, 408, 410, 411, 411, 412, 432, 433
- legislation, relation to, 411, 412, 432, 433
- nature of, 395, 433

JURY,

- borough, representing, 13
- Commissioners of Sewers, of, 626
- petty, scope of, 15
- sheriff's tourn, at, 11

JUSTICE,

- administrative, 407-413

JUSTICES IN EYRE, 13, 240, 639

JUSTICES' LICENCES FOR SALE OF INTOXICANTS,

- conditions attached to, 785, 786
- confirmation of, 786, 791
- disqualifications for, 793
- duration of, 785
- grant of new, 785
- history of, 782, 783
- monopoly value of, 782, 783, 785-789
- ordinary removal of, 791
- protection order for, 791
- provisional, 787
 - ordinary removal of, 791
- renewal of new, 787
 - old off, 788
 - on, 788, 789
- special removals of, 790
- suspension of, 792
- transfer of, 790
- types of,
 - early closing, 784
 - occasional, 791
 - off, 784
 - old off, 788
 - on, 788, 789
 - on, 784
 - provisional, 787
 - six-day, 784

JUSTICES OF ASSIZE,

- duties of, 241

JUSTICES OF THE PEACE,

- administrative work of, 15, 18, 19, 21, 241, 369-371
- aldermen of City of London are, 260

Index

JUSTICES OF THE PEACE—*continued.*

- appeal to, drivers' and conductors' licences, as to, 776, 778
- interim development, against postponement of, 559
- local authorities, from, 410
- planning scheme, under, 554, 564
- public health, as to, 398
- appointment of, 15, 18, 19, 57
- areas of jurisdiction of, 15, 241-243
- boroughs, of, appointment of, 15, 242, 250
 - expenses of, 250-252
 - jurisdiction of, 251
- chairmen of county councils are, 53
 - district councils are, 50
- City of London, in, 250
- clerk to, appointment of, 15
- county, of, expenses of, payment of, 244
 - jurisdiction in boroughs of, 242, 245, 250, 251
- history of, 14-16, 18-20, 25, 241
- judicial control over, 21-23, 370, 405
- licensing powers of, 780-793
- mayors are, 61, 250, 251
- Metropolis, in, 270, 271
- police duties of, 15, 409, 641, 642, 646, 647, 650, 658
- powers of, transfer of, 31, 52, 243
- stipendiary magistrates, 253
- summary jurisdiction of, 15
- tenure of office of, 19
- tort, liability for, 370

L

LABORATORIES,

- provision of, 512

LABOUR EXCHANGES,

- control and maintenance of, 5, 474

LAND,

- acquisition of. *See* ACQUISITION OF LAND
- appropriation of, consent to, 238, 414
 - Housing Act, under, 414, 517
- disposition of, powers of, 236-238
- exchange of, local authorities, by, 237, 238
- lease of, local authorities, by, 237, 238
- management of, powers of, 236-238
- purchase of, powers for, 227, 228
- sale of, local authorities, by, 237, 238

LAND DRAINAGE,

- catchment areas, 631, 632
 - boards, 477, 631-635
- county and county borough councils, by, 635, 636
- default powers over, 630, 635
- expenses of, 634
- grants in aid of, 635
- highway authorities, contribution by, for, 630
- history of, 23, 625-631

Index

LAND DRAINAGE—*continued*.

- internal drainage boards, 631-635
 - districts, 631, 632
- main river, of, 633, 634
- maintenance of works for, 625, 627, 630, 633, 636
- new works for, 626, 637, 630, 636
- public health authorities, contributions by, for, 630
- rating for, 163, 625-630, 636, 637
- Royal Commission on, 631
- schemes for, 633, 634

LAW,

- determination by administrative body of, 422, 424-426
- public rights, recognition of, by, 430
- Rule, or Supremacy, of, 295, 307, 308, 403-406, 429-432, 435, 454

LEASE,

- acquisition of land by, 227, 228
- corporate land, of, 237
- land, of, local authorities, by, 238

LEET. *See* COURT LEET

LEGISLATION,

- delegated. *See* DELEGATED LEGISLATION
- local authorities, power to promote or oppose, 296-301
- social, local government services, effect on, 473
- war, local government, effect on, 472, 473, 475, 476

LEGISLATIVE FUNCTIONS,

- administration, relation to, 307, 308, 411, 412, 432, 433
- judicial functions, relation to, 411, 412, 432, 433

LETTERS PATENT,

- commission of the peace of borough, revocation of, by, 252

LIBRARY COMMISSIONERS,

- existence of, 733

LICENCE,

- camping, of, 498, 499
- carriers, 777-779
- electricity, supply of, under, 764
- public service vehicle, 775, 776
- road service, conditions attached to, 776, 777

LICENSED PREMISES,

- conduct of, 792, 793
- hours of opening of, 784, 791
- war damaged areas, planning in, 792

LICENSING,

- armorial bearings, of, abolition of, 178 *n.*, 773 *n.*
- cinematograph exhibition, of, 395, 415 *n.*, 779, 780
- committee, 784
- conductors of public service vehicles, of, 776
- dogs, of, assigned revenue, as, 773
 - collection of duty, 178
- drivers of goods vehicles, of, 778
 - mechanically propelled vehicles, of, 774
 - public service vehicles, of, 776

Index

LICENSING—*continued.*

- game licences, assigned revenue, as, 773
 - collection of duty, 178
- gun licences, collection of duty, 178
- hackney carriages, of, 775 *n.*
 - abolition of, 178 *n.*, 773 *n.*
- intoxicants, excise licences, 781, 783
 - history of, 780-783
 - monopoly value in, 782, 783, 786-788
 - petty sessions, by, 791
 - protection order for, 791
 - retail sale of, 780-793
- justices, 784
- mechanically propelled vehicles, of, assigned revenue, as, 773
 - collection of duty, 178 *n.*, 179 *n.*
- motor goods vehicles, of, 777-779
 - vehicles, of, 178 *n.*, 773, 774, 777-779
- public entertainment, of, 779, 780
 - service vehicles, of, 415, 774-777
- purpose of, 773, 777, 779, 783
- sessions, 782, 785
- stage plays, of, 779
- theatres, of, 779

LICENSING PLANNING COMMITTEES, establishment of, 552

LIGHT RAILWAY COMMISSIONERS, 763

LIGHT RAILWAYS, 192, 763

LIGHTING, streets, of. *See* STREETS

LIGHTING AND WATCHING, Commissioners for, 24 districts, number in 1883...30

LIMITATION OF ACTIONS, Public Authorities Protection Act, 1893, under, 459-461

LITIGATION, local authorities in, 437-461

LIVESTOCK COMMISSION, slaughterhouses, powers as to, 749

LOANS, acquisition of markets, for, 747 county council, consent of, for, 48 housing, for, 533, 535 internal resources, by means of, 194 joint electricity authorities, of, 769 local Acts, under, 193, 194, 359 London County Council, consent of, for, 263 metropolitan borough councils, of, 262, 263 open market, by means of, 194 parish councils, of, approval for, 46, 48, 192 *n.*, 193 *n.*, 366 meeting, approval of, for, 46 power to contract, 190-194

Index

LOANS—*continued*.

- priority of, 193
- Public Works Loans Commissioners, through, 194
- sanction to, 46, 48, 192, 193, 263, 344, 359, 360
- small dwellings acquisition, for, 540
- sources of, 194
- temporary, 193
- tramways, for, 762
- Treasury powers respecting, 194

LOCAL ACTS,

- alteration by provisional order of, 314, 315
 - of areas by, 85, 86
- Clauses Acts, incorporation of, in, 312 *n.*, 742, 743
- compulsory purchase under, 229
- consolidation of, 465, 466
- county borough, creation of, by, 63, 73, 85 *n.*
- gas supply under, 756, 758
- importance of, 295, 308, 309, 465, 466
- lighting under, 745, 756
- loans under, 193, 194, 359
- markets provided under, 746
- powers incorporated in general legislation, 466, 490, 491
- procedure in passing of, 301-309
- promotion of and opposition to, 296-301
- purpose of, 295, 296, 466
- validity of, 317
- water supply under, 751

LOCAL AUTHORITIES,

- absolute and conditional statutory authority, 441, 443
- acts of, when illegal, 374, 375
- appeals by, Minister of Health, to, 39
- appropriation of land by, 238
- central administrative control over, 7, 8, 278, 338-365, 367, 368
 - government contrasted with, 6-8, 131, 132, 134, 135
- composition of, 87
- compulsory purchase of land by, 228, 229
 - order, use of, by, 230, 231
- contracts of, 448-455
- corporate bodies, are, 6, 282, 448
- creation of new, 67-71, 77
- default by, 360-365
- delegation by, committees, to, 140, 141, 148
 - local authorities, to, 52, 142
 - parish councils, to, 48
- dispute between, 408, 409
 - with individuals, 409-412
 - officers, 409
- doctrine of *ultra vires* and, 286-291
- election of, 6
- excess of power of, 375, 376
- exchange of land by, 238
- expenditure of, extent of, 476
 - unauthorised, injunction to restrain, 195, 196
- expenses of, 196, 197
- failure to perform duties by, 376

Index

LOCAL AUTHORITIES—*continued.*

- funds of, trust, are held on, 195, 290
- general powers of, 225-239
- gifts, power to accept, 238
- income of, 151, 152, 190
- incorporation of, 282
- judicial control of, 369-371, 373-377, 378-400
 - functions of, 397, 420
- lease of land by, 238
- legislative powers of, 213, 279
 - necessity for, 277, 281-291
- litigation, in, 437-461
- means of questioning decisions of, 378-380
- mis-feasance and non-feasance of, 446, 447
- officers of, status of, 6
- power of, statute, derived from, 225, 226, 277, 281-291, 292
- practical working of, 121-150
- precepting authorities, when, 164
- promotion of and opposition to legislation by, 296-301
- property of, held in trust, 195, 196, 290
 - income from, 151, 152
 - ultra vires* application of, 286, 288
- public utility undertakings, powers over, 739, 740
- rating powers of, 7
- relators in actions by Attorney-General, as, 381-383
- remedies against, 375, 376
- returns furnished by, 211, 212, 350
- services administered by, 132, 466-476
- teachers, training of, duty as to, 730
- tort, liability for, 370, 373, 374, 437-447
- unemployment relief works of, 474, 475
- voluntary hospitals, co-operation with, of, 512

LOCAL BOARDS OF HEALTH,

- creation of, 39, 484
- duties of, 486, 487

LOCAL EDUCATION AUTHORITIES,

- teachers, appointment and dismissal of, by, 713
 - liability for acts of, 440
- transfer of powers to, 704

LOCAL GOVERNMENT BOARD,

- appeal to, Housing Acts, under, 426
- creation of, 40
- transfer of powers to, 670

LOCAL GOVERNMENT BOUNDARY COMMISSION,

- alteration of areas by, 75-77, 84
- composition of, 76
- decisions of, procedure as to, 78
- duties of, 76
- principles guiding, 76
- regulations controlling, 78

LOCAL GOVERNMENT DISTRICTS,

- creation of, 488

LOCAL HEALTH DISTRICTS,

- areas declared, 486

Index

LOCAL INQUIRY,

- alteration of areas on, 69, 80, 82
- costs of, 344, 350
- county council, by, alteration of areas, on, 82
 - compulsory purchases, on, 235, 236, 408
 - default by rural district council, on, 362, 366
- Home Secretary, by, alteration of areas, on, 80, 81
- Local Government Board, by, Housing Act, under, 426
- Minister of Health, by,
 - alteration of areas, on, 69, 408
 - clearance order, on, 417, 525
 - compulsory purchase, on, 231, 232, 236, 408, 525
 - construction of reservoir, on, 754
 - sewers, on, 506
 - default in housing, on, 362, 533
 - planning, on, 363
 - public health, on, 361
 - poor law, in, 344
 - promotion of legislation, on, 299
 - provisional order, on making of, 312
- Minister of Town and Country Planning, by, joint committee, on constitution of, 552
- Minister of Transport, by, ribbon development, as to, 411
- powers of person holding, 350, 426, 427
- scheme, on making of, 316, 352

LOCAL LAND CHARGES,

- registration of, 557

LOCAL TAXATION,

- licences, development of, 174, 175
- duties, collection of, 175
 - equitable adjustment of, 178 *n.*
- grant of, 773

LONDON AND HOME COUNTIES TRAFFIC ADVISORY COMMITTEE, 273

LONDON COUNTY COUNCIL,

- bye-laws of, 262
- City Corporation, relations with, 256, 260, 261
- constitution of, 261
- county apportionment of, 266-268
- functions of, 261-263, 265
- general exchequer grant of, 268
- housing authority, as, 262, 520
- metropolitan borough councils, relations with, 262

LONDON GOVERNMENT,

- equalisation of rate burden, 264-266, 268
- finance of, 262-268
- history of, 255-258
- local authorities in, 258-264
- Local Government Act, 1933, application of, to, 254 *n.*
- peculiarities in, 254, 255
- service not performed by local authorities in, 269-273

LONDON PASSENGER TRANSPORT BOARD,

- Appointing Trustees of, 273
- body corporate, is, 272
- power of, 272

Index

- LORD CHAIRMAN OF COMMITTEES,
allocation of local Bills by, 303
discretion of, 306
- LORD CHAMBERLAIN,
licensing functions of, 779
- LORD LIEUTENANT,
appointment and duties of, 56, 57
- LORD MAYOR,
creation of, 61 *n.*
London, of, election of, 259
- LOTS,
drawing at elections of, 111, 112

M

- MAIN ROADS,
bridges in, repair of, 612
dismaining of, 590
disturnpiked roads becoming, 589, 590
Metropolis, in, control over, 262
- MANAGEMENT COMMITTEE,
poor law institution, of, 684, 686
- MANAGERS,
aided schools, for, 711
controlled schools, for, 711
county primary school, of, appointment of, 710
school, for, constitution of, 710
foundation, aided schools, for, proportion of, 711
controlled schools, for, proportion of, 711
non-provided schools, for, proportion of, 708, 709
special agreement schools, for, proportion of, 711
joint body of, education, for, 707, 708
non-provided schools, of, appointment of, 708
- MANDAMUS, ORDER OF,
action for, 392
Crown servant, when lies to, 390
default order, for enforcing, 391, 494, 565
enforcement of, 389, 390
judicial functions, for controlling exercise of, 413, 425
local authorities, lies to, 390
performance of duties, to compel, 363, 376, 394, 444
- MARKETS,
acquisition by local authorities of, 746-748
bye-laws for, 748
creation of, 744, 746-748
disturbance of, 744, 746
franchise of, 743, 744
history of, 743, 744
livestock, for, 749
market authorities, power of, 748-750

Index

MARKETS—*continued.*

- statutory, 747
- tolls, etc., for, 744, 745, 748
- weighing machines and weights for, 748
- what are, 744, 745

MASTER AND SERVANT,

- relation of, application to local authorities of, 438-440

MATERNITY AND CHILD WELFARE,

- committee for, composition of, 137, 144, 513
- provisions for, 512-514

MAYOR,

- borough, of, absence from borough of, 107, 108
- duties of, 61, 109
- election of, 61, 88 *n.*
- justice of the peace, as, 61, 250, 251
- precedence of, 61
- proceedings to question qualification of, 119, 120, 388, 389
- qualification of, 61, 88
- remuneration of, 61, 103
- term of office of, 61, 88 *n.*

MEALS,

- scholars, for, provision of, 695, 717, 718

MECHANICALLY PROPELLED VEHICLES,

- licence duty for, assigned revenue, as part of, 773
- collection of, 178 *n.*, 179 *n.*

MEDICAL OFFICER OF HEALTH,

- borough or district, of, appointment of, 51, 61, 124, 125, 353, 355
- central control over, 353-356
- dismissal of, 125, 355, 356
- duties of, 353, 355, 521, 522
- grant in aid of salary of, 176, 177, 353-356
- qualifications of, 353, 355
- salary of, 125, 126, 353, 355
- tenure of office of, 125, 353, 355, 356
- county, of, appointment of, 56, 124-126
- dismissal of, 126, 356
- duties of, 356, 521, 522
- tenure of office of, 126, 356

MEETINGS,

- incorporation as borough, relating to, 68
- local authorities, of, admission of press and public to, 129
- business transacted at, 129
- convening of, 129
- minutes of, 129
- notice of, 129
- number of, 50, 61, 62, 128, 129
- privileged statements at, 130
- quorum at, 129
- reports of, 130
- voting at, 129

MEMBERS OF LOCAL AUTHORITIES,

- absence of, effect of, 107, 108
- acceptance of office by, 113, 114

Index

MEMBERS OF LOCAL AUTHORITIES—*continued*.

- death of, 107
- disability for interest of, 122, 123, 420 *n*.
- disqualification of, 107, 115, 117
- liability of, 128, 374, 437
- privileged statements of, 130
- procedure for testing qualifications of, 115-120, 376, 388, 389
- qualifications of, 99, 100
- resignation of, 107
- retiring, when re-elected, 111
- travelling expenses of, 239
- unauthorised expenditure by, injunction to restrain, 196
- vacation of office by, 108
- work of, 126, 127, 132, 134, 135

METROPOLIS,

- City of London police acting in, 657
- general exchequer grants of, 266
- housing authorities in, 520
- Local Government Act, 1933, application of, to, 254 *n*.
- peculiarities in government of the, 254, 255
- present-day government of, 258, 259
- rating authorities in, 263, 264, 265

METROPOLITAN ASYLUMS BOARD, 265, 266

METROPOLITAN BOARD OF WORKS,

- creation and composition of, 258
- powers and duties of, 258

METROPOLITAN BOROUGH,

- rating authority, as, 265

METROPOLITAN BOROUGH COUNCILLORS, 264

METROPOLITAN BOROUGH COUNCILS,

- aldermen of, number of, 264
- audit of, 264
- bye-laws of, 262
- constitution of, 264
- general exchequer grants of, 267
- housing authorities, as, 520
- loans of, 262, 263
- powers of, 262, 264

METROPOLITAN BOROUGH'S' STANDING JOINT COMMITTEE

- representation on, 263

METROPOLITAN COMMON POOR FUND, 265, 266

METROPOLITAN POLICE,

- area of authority of, 655, 656
- control of, 255, 271, 643, 646
- creation of, 271, 643
- district, 271, 655, 656
- government of, 262, 271, 656
- grants in aid of, 656
- history of, 270-272
- rates for, 646
- Receiver of, corporation sole, as, 646

Index

METROPOLITAN WATER BOARD, 272, 273

MIDWIVES,

grants in aid of, 181, 189, 347 *n.*
provision of service of, 514

MILK,

scholars, for, 695, 718, 729

MINISTER OF AGRICULTURE AND FISHERIES,

fisheries powers of, 619, 620
land drainage powers of, 630-635, 637

MINISTER OF EDUCATION,

education grants, power over, 352
grant regulations of, 352
inspection by, 350 *n.*
powers of, 38
recreational facilities, provision of, by, 189
schemes for education, approval of, 706
teachers, training of, duty as to, 730

MINISTER OF HEALTH,

alteration of areas by, 73, 76, 82, 83, 349
appeal to, 400, 423, 424, 434, 502, 506, 508, 563
district auditor, from, 205-207, 359, 386, 400, 411
parish council, by, compulsory purchase, as to, 236, 367, 408
private street works, as to, 423, 424, 598, 600
apportionment of expenses of joint committee by, 408
appropriation of land, consent to, 238, 414
bye-laws, confirmation of, by, 216, 218, 219
waiver of, consent to, 224, 502
clearance order, confirmation of, 421, 525, 526
compulsory purchase orders, confirmation of, 232, 233, 236, 421, 422,
428, 525, 526
control over, 230, 231, 233, 314, 367
conferring powers of, 349
corporate land, acquisition and disposal of, consent to, 237
default powers of, 361-364, 493, 494, 500, 509, 565
disability for interest, removal of, by, 123
disqualification for surcharge, removal by, 208
garden cities, acquisition of land for, 564
general exchequer grant, reduction of, 356-358
grants, withholding of, 353, 355, 357
housing powers of, 352, 521, 524-526
proposals submitted to, 530, 531
inspections and inquiries by, 344, 349, 350
joint board for united district constituted by, 146, 477, 492
committee, constitution of, 344, 477, 624, 673
loans, sanction of, by, 192, 193, 263, 359
local authority officers, control over, 39, 125, 126, 353-356
dismissal of, consent to, 125, 126
financial returns to, 212
notifiable diseases, approval of addition to, 511
planning powers of, 320 *n.*, 363, 408, 546-553, 558-564
poor law, control over, 125, 364, 671, 672
powers of, 341-346, 350, 351, 671-674, 684, 685
promotion of legislation, consent to, 299
proposals as to alteration of areas submitted to, 74

Index

MINISTER OF HEALTH—*continued.*

- provisional orders of, 231, 232, 312, 313, 751
- remission of surcharge by, 207, 386
- reservoir, consent to construction of, 754
- rivers pollution prevention powers of, 622-624
- rural district councillors, nomination of, by, 87 *n.*
- scheme for assessment areas, confirmation by, 159
 - pending incorporation of borough, reference of, to, 70
- water supply, cost of, contribution to, 753
 - in bulk, consent to, 754
- waterworks, consent to purchase of, 754

MINISTER OF TOWN AND COUNTRY PLANNING,

- appointment of, 549
- local inquiry by, 552
- transfer of planning functions to, 549

MINISTER OF TRANSPORT,

- appeal to, county road, as to, 409, 592
 - prohibition of traffic over bridge, against, 615
 - public service vehicle licence, as to, 775
 - ribbon development, as to, 411, 575, 605
 - road service licence, respecting, 415, 777
- classification of roads by, 574, 591 *n.*
- construction of roads by, 579
- electricity powers of, 146, 764, 765, 768, 769
- highway powers of, delegation of, 593
- light railway powers of, 763
- pedestrian crossing places, confirmation of schemes for, 607
- road maintenance, control over, 357
- standard width, approval of, 574, 605
- tort, liability for, 373 *n.*
- traffic commissioners appointed by, 775
 - regulations in Metropolis of, 273
- tramway powers of, 760, 762
- trunk roads, as authority for, 37, 183, 592, 593, 605, 607, 614

MINUTES,

- council meetings, of, 129
- inspection of, 129, 139

MISFEASANCE,

- liability for, 446, 447, 594 *n.*

MONOPOLY VALUE,

- justices' licences, of, 782, 783, 785-788

MORTGAGE,

- corporate land, of, 183 *n.*, 193, 237
- housing, for, 531

MORTUARIES,

- provision of, 48, 512

MOTOR CAR LICENCES,

- goods vehicles, licensing of, 777-779
- passenger vehicles, licensing of, 774-777

MOVEABLE DWELLINGS,

- bye-laws for, 498, 499

Index

MUNICIPAL CORPORATION,
common law corporation, 13, 287
composition of, 60, 282
contracts of, 288, 448
doctrine of *ultra vires* and, 287-291
powers of, limited by statute, 287-291

MUNICIPAL TRADING,
development of, 468-470
profits from, application of, 152

MUSEUMS, 295, 735

N

NATIONAL ADVISORY COUNCIL FOR PHYSICAL TRAINING,
local committees assisting, 737

NATIONAL FIRE SERVICE,
establishment of, 665

NATURAL JUSTICE,
rules of, 415-427

NEGLIGENCE,
local authorities, liability of, for, 374
statutory powers, in exercise of, 441

NET ANNUAL VALUE,
deductions to ascertain, 156
rateable value, as, 156, 157

NEW BUILDINGS,
bye-laws as to, 499-502

NEW STREETS,
bye-laws as to, 499, 601
layout of, 601, 602

NOMINATION,
consent of candidate to, 113, 114
day, date of, 109
papers, adjudication on, 110, 111

NON-COUNTY BOROUGHES,
administration of justice in, 248-252
alteration of boundaries of, 76
county boroughs distinguished from, 41, 62
councils, relation with, 35, 62, 246
highway authorities, as, 594
powers of, relinquishment of, 142
quarter sessions, grant of, to, 250
supplementary exchequer grant of, 188
union with other boroughs of, 76

NON-FEASANCE,
liability of local authorities for, 446, 447, 594 *n.*

NON-PROVIDED SCHOOL,
local education authority, duty of, as to, 424, 425, 707-714
maintenance of, 708, 709
liability for, 711, 712

Index

NON-PROVIDED SCHOOL—*continued.*

managers of, 708, 709
 duties of, 456 *n.*, 708
repair of, liability for, 711, 712
teachers in, disqualification of, 102

NOTICE,

borough wards, of scheme for alteration of, 81, 82
claim, of, Public Authorities Protection Act, 1893, under, 461
elections, of, 109
incorporation of borough, petition for, of, 69
 scheme pending, of, 70
new industrial buildings, of erection of, 567

NUISANCES,

abatement of, 482, 488, 494, 495
bye-laws for prevention and suppression of, 215-218, 262, 748
public, alehouse, inn or tavern, by, 780
 bridge in highway, by, 610
 Health Acts, under, 494, 495, 498
 highway, on, 381, 382, 482, 572, 584
 remedies for, 381, 384, 481

NURSING HOMES,

registration of, 512, 780

O

OBJECTION,

draft valuation list, to, 159, 160, 163

OCCUPIER,

rateable, 154-163

OFFENSIVE TRADES, 495

OFFICE,

acceptance of, members of local authorities, by, 113, 114
paid, local authority, under, appointment of members to, 103
 disqualification for, 102, 103
 restriction on appointment to, 103, 105 *n.*

OFFICE OF THE CLERK OF THE PARLIAMENTS, 301

OFFICERS,

appointment of, 55, 56, 61, 123-125, 450
central control over, 353, 356
compensation to, 84, 126
conditions of employment of, 124-126
disputes between local authority and, settlement of, 409
disqualification of, 102
functions of, transfer of, war service as affecting, 126 *n.*
interest in contracts of, 128
legal position of, 6, 126-128
liability of local authority for acts of, 437-440
Minister of Health's powers over, 125, 126, 344-346, 353-356
poor law, control over, 344-346
 tenure of office of, 125
Public Authorities Protection Act, 1893, within, 456

Index

OFFICERS—*continued.*

- remuneration of, 123, 124, 203
- superannuation of, provision for, 126
- transfer of, alteration of areas, on, 70, 84, 126, 672
- unauthorised expenditure by, injunction to restrain, 196
- work of, 126-128, 134, 135

OMNIBUSES,

- power to run, 762

OPEN MARKET,

- borrowing in, 194

OPEN SPACES,

- acquisition of, 514
- compulsory purchase of, 233, 234 *n.*
- planning schemes for, 553

ORDER IN COUNCIL,

- borough councillors, alteration of number of, by, 81
- general rate fund, for payment out of, 198
- quarter sessions, revocation of, by, 252
- division of borough into wards by, 81
- poor law orders, disallowance of, by, 343
- schemes confirmed by, 70, 81
- special constables, as to, 646

ORDERS,

- joint electricity authority, for constitution of, 768
- light railway, for, 763
- payment out of county fund, for, 199, 386, 399, 400
- general rate fund of borough, for, 198, 289, 386, 399, 400

ORDINARY REMOVAL,

- justices' licence, of, 791

OVERCROWDING,

- liability for permitting, 530

OVERSEERS,

- fisheries, of, appointment of, 618
- poor, of the, appointment of, 24, 667
- transfer of powers of, 668

OWNERS,

- rating, land drainage, for, 627, 634
- of, 169

P

PARENTAL RIGHTS,

- vesting in local authority of, 687

PARISH,

- adoption of Parochial Adoptive Acts by, 48, 294, 733, 756
- alteration of boundaries of, 74, 77, 83, 84
- highway duties of, 384, 581-587, 594
- history of, 11, 16, 17, 25, 32, 43
- property, application of, 48

Index

PARISH—*continued.*

rating and valuation in, 43, 44
repair of bridges by, 610
rural. *See* RURAL PARISH
union of, 82-84

PARISH CONSTABLE,

duties of, 641, 642
supersession of, 644, 645

PARISH COUNCIL,

acquisition of land by, agreement, by, 227, 228
body corporate, is, 60
borrowing powers of, 48
candidates for, nomination of, 109, 110
committees of, appointment and composition of, 136, 137
complaint by, 366, 522, 569, 593
composition of, 46
compulsory purchase of land on behalf of, 228, 230, 235, 236, 400, 428
co-optation by, 108
creation of, 32, 45, 83
delegation to, rural district council, by, 48, 143
disposition of land by, 238
dissolution of, 45, 83
district council, as agents of, 49
elections to, 45, 108, 109, 112
 failure to hold, 367
electoral areas for, 45, 97
incorporated, is, 47, 282
loans of, 191, 192
 approval for, 46, 48, 192 *n.*, 193 *n.*, 366
meetings of, admission of public to, 129
nominations for, 110
officer, appointment of, 48, 123 *n.*
parish meeting, relation to, 45
returning officer of, 109
sealing by, 47, 283, 452
statutory corporation, is, 47, 286
wards for elections to, 45, 83, 97
water supply, provision of, 48

PARISH COUNCILLORS,

absence of, effect of, 107, 108
casual vacancies of, 108
death of, 107
election of, 45, 108, 112
forfeiture of office by, 107
nomination of, 109-112
qualification of, 100
resignation of, 107
retirement of, 46, 90, 91
term of office of, 46, 90, 92, 93

PARISH MEETING,

assemblies of, 44, 46
committees of, appointment and composition of, 137
creation of, 32, 44

Index

PARISH MEETING—*continued*.

- parish land, consent to disposition of, 238
- Parochial Adoptive Acts, adoption of, 48, 294, 733, 756
- precepting authority, as, 164 *n*.
- unincorporated, is, 47

PARKS,

- acquisition of land for, 514

PARLIAMENT,

- Acts of. *See* ACT OF PARLIAMENT
- administrative work of, 149, 296, 308, 433
- delegation to Executive by, 318, 323
- derivation of powers from, 277, 281, 282, 292
- local government, control over, 277, 278, 308
- Ministers, control over, 323
- procedure on general Bill in, 293, 319, 320
 - local Bill in, 301-309
- provisional order, confirmation of, by, 313
- sovereignty of, 295, 296, 317, 318
- work of, local legislation, in, 307, 308

PAROCHIAL ADOPTIVE ACTS, 48, 294, 511, 733

PAROCHIAL COMMITTEES, 143

PART PERFORMANCE,

- contract not under seal, of, 454, 455

PART II AUTHORITIES,

- who are, 705 *n*.

PART III AUTHORITIES,

- who are, 705 *n*.

PAVING COMMISSIONERS,

- Metropolis, in, 256, 258
- powers of, 586

PEDESTRIAN CROSSING PLACES,

- system of, 607

PENSIONS,

- police, grants in aid of, 177, 181
- retirement, on, 659

PERCENTAGE GRANTS,

- abolition of, 175, 176
- block grants replacing, 178
- education, for, 729
- new application of, 177
- partial discontinuance of, 178, 179, 181
- replacement of, 174

PERSONATION,

- elections, at, 115

PETITION,

- borough, for incorporation as, 68, 69
- election, 111, 115-117
- electoral areas, against alteration of, effect of, 80
- local Bill, for, 301
- quarter sessions, for, borough, by, 248
- right, of, 372, 373

Index

- PETTY CONSTABLES,
 appointment and duties of, 11, 641, 642
- PETTY JURY,
 scope of, 15
- PETTY SESSIONAL DIVISIONS
 division of county into, 56, 241
 institution of, 15
- PETTY SESSIONS,
 administrative powers of, 18
 areas of, 15, 56, 241
 boroughs in, 250, 251, 253
 licensing powers of, 792, 793
- PHYSICAL TRAINING,
 appropriation of land for, 514
 grants in aid of, 189, 515, 737
 schools, provision for, 695, 720
 swimming baths for, 511
- PLANNING SCHEMES,
 acquisition of land under, 550, 558
 compensation under, 554, 556
 enforcement of, 563, 564
 interim development, 557, 561
 local authorities for, 552
 objects of, 553
 preparation of, 552, 561, 562
 procedure in making, 554, 555
 responsible authorities under, 477, 546, 555, 556
- PLANS,
 new buildings, of, deposit of, 501
 passing of, 391, 501, 502
 streets, of, deposit of, 602
- PLAY CENTRES, 723
- PLAYING FIELDS, 515, 737
- PLEASURE GROUNDS, 514
- POLICE. *See also* CONSTABLES
 borough forces,
 creation of, 644, 648
 dismissal of, 409
 government of, 649-651
 watch committees' powers over, 139, 400, 650, 651
 central control over, 39, 341, 348 *n.*, 350 *n.*, 351, 352, 652-655
 City of London force,
 creation of, 643, 644, 657
 government of, 657
 grants in aid of, 657
 orders and regulations for, 657
 consolidation of forces, 648, 649
 county forces,
 constitution of, 647, 648
 creation of, 644, 646, 647
 dismissal of, 409
 government of, 647, 651
 standing joint committees' powers over, 54, 139, 647, 648

Index

POLICE—*continued*

duties of, 659, 660
expenses of, 656, 657, 661, 662
grant in aid of, 173, 176, 177, 179, 181, 350, 647, 650, 652, 653, 655–657, 660
history of, 638–644
inspection of, 350 *n.*, 352, 652–654, 657
justices of the peace, jurisdiction of, over, 15, 409, 641, 642, 646, 647
metropolitan force. *See* METROPOLITAN POLICE
pensions and allowances, 177, 181, 659
powers of, 658–660
railway and canal, 658
regulations of Home Secretary for, 348 *n.*, 351, 352, 646, 653
reorganisation of, 642–644
township, duties of, 639–641
war service, pay and superannuation during, 659
wartime amalgamation of, 652
watch and ward, 642
work of, 661

POLICE FEDERATION,

composition and purpose of, 660, 661

POLL,

election of councillors, when necessary at, 112
parish meeting, demanded at, 46, 112
town's meeting, after demand for, 300

POLLUTION OF RIVERS,

concession to industry, 621–624
prescriptive right of, 622, 623
prevention of, 621–624
sewage, by, 620, 621, 623, 624
trade effluents, by, 620–623

POOR LAW,

accounts of, audit of, 344, 673
administration, county and county borough councils, transfer to, 32, 102, 666, 672, 673
authorities, 31, 32, 54, 267 *n.*, 342–344, 671
boarded-out children, 687
central control over, 26, 28, 30, 38, 39, 59, 339–346, 671, 672
children's homes, 686
combination of areas for, 343, 344, 673
committees, relations between, 676–678
conveyance of chargeable persons under, 674
destitution within, 678, 679
education, relation to, 675
grants in aid of, 176, 674
history of, 17, 18, 24, 25, 28, 31, 32, 666–671
hospitals, provision of, 675, 683
inspections and inquiries as to, 344
irremovability, 688–690
joint committees for, 147, 344
Metropolis, in, 257, 262, 265
Minister of Health, control of, over, 125, 341, 364, 671
orders, 342, 343, 682
parental rights, vesting in local authority of, 687

Index

POOR LAW—*continued.*

- parishes, poor law unions, relation to, 30, 31
- public health, relation to, 484, 485, 675
- relatives, duty of, to maintain, 680
- relief, able-bodied, to, 682, 683
 - administration of, 671, 672, 675, 677, 678, 680-687
 - burials, for, 682, 683
 - casuals, to, 685, 686
 - children, to, 686, 687
 - in kind, 681-683
 - indoor, 681, 683-685
 - justices, ordered by, 18, 673
 - loan, by way of, 679
 - medical, 682, 683
 - Minister of Health, prescribed by, 342
 - outdoor, 679, 681, 683
 - receipt of, disqualification for, 104, 105
 - repayment of, 679, 680
- removal, 668, 688, 689, 692
- schemes for administration of, 674-676, 681
- settlement, 668, 687-692
- unemployed persons and, 183, 683
- unions, 28-31, 666, 668, 670

POOR LAW BOARD, 39, 40, 670

POOR LAW COMMISSIONERS,

- central control over, 340
- creation of, 39, 670
- institution of, 339
- powers of, 28, 670
- replacement of, 39, 670

POOR LAW INSTITUTIONS,

- discharge from, 685
- inspection of, 684
- officers of, 684, 685

POOR LAW PARISHES,

- history of, 666, 668

POOR RATE,

- assessment and collection of, 153
- civil parish, in, 43

PORT HEALTH AUTHORITIES,

- creation of, 493
- joint boards, as, 146
- Port of London, for, 260, 273

PORT OF LONDON, 259, 260, 273

PORT OF LONDON AUTHORITY, 273

POWERS,

- acquisition of, 292-316
- colourable exercise of, 418, 419
- construction of statutes conferring, 441, 442
- discretionary, 412-414, 444
- excess of, 374-376, 393, 413-415

Index

POWERS—*continued*.

- exercise of, 413, 414
- judicial control over, 278, 412-436
- legislative, 414
- ministerial, 394, 396, 414
- municipal corporations, of, 288-291
- Parliament, derivation from, 277, 278, 281-291, 292
- statutory, contract not to exercise, 448, 449
 - necessity for, 225, 226, 281-291
 - tortious liability for failure to exercise, 443-447
 - in exercise of, 441-443

PRECEPT, 146, 164, 164 *n.*, 265, 634, 700

PRECEPTING AUTHORITIES, 164, 164 *n.*, 166

PREROGATIVE WRITS,

- certiorari*, 22, 198 *n.*, 199 *n.*, 205, 376 *n.*, 385, 412
- habeas corpus*, 385
- mandamus*, 22, 376 *n.*, 385, 387 *n.*, 388
- proceedings replacing, 376 *n.*, 384-387
- prohibition, 22, 376 *n.*, 385, 412
- quo warranto*, 376 *n.*, 385, 387
- supersession of, 376 *n.*, 384-387, 430

PRESCRIPTION,

- pollution of rivers by, 622

PRESS,

- admission of, meetings, to, 129
- council meetings, reports of, 130

PRIVATE BILLS,

- allocation between the two Houses, 303
- Clauses Acts, incorporation of, in, 311
- committee stage in, 304, 310
- first reading of, 303, 304
- legislation, nature and importance of, 307-309
- opposed, procedure in case of, 305
- report and third reading, 306, 307
- Royal Assent to, 307
- second reading, 303
- unopposed, procedure in case of, 305, 306

PRIVATE STREET WORKS,

- appeals in, 398, 423, 598, 600
- control of, 597-601

PRIVY COUNCIL,

- borough councillors, alteration of number of, by, 81
- ward, alteration of, by, 81
- education, control over, 696
- justices of the peace, control of, by, 16, 20
- public health functions of, 39, 40, 484, 487

PROHIBITION, ORDER OF,

- defects of, 22
- judicial functions, control of, by, 376, 412
- justices of the peace, control of, by, 22
- nature of, 393
- order of *certiorari*, relation to, 393

Index

- PROTECTION ORDER, 791
- PROVIDED SCHOOLS, 697
- PROVISIONAL LICENCES, 787
- PROVISIONAL ORDERS,
alteration of areas by, 73, 74
Clauses Acts, incorporation of, by, 312
compulsory purchase by, 230-234, 314
Confirmation Bill, 313, 314
county borough, creation of, by, 63, 73
extension of, by, 73
drainage district, constitution of, by, 630
electricity supply, for, 765, 767
gas supply, for, 757
procedure on, 312, 313
repeal, etc., of local Acts by, 314, 315
tramways, for, 312 *n.*, 760, 761
validity of, 233, 318
water supply, for, 751
- PROVISIONAL RULES, 336, 337
- PUBLIC ANALYST,
appointment and dismissal of, 356 *n.*, 497
certificate of, 498
- PUBLIC ASSISTANCE. *See also* POOR LAW
committee, appointment of, 136, 676
powers of, 676, 681
- PUBLIC AUTHORITIES,
exercise of powers by, 413-433
Public Authorities Protection Act, 1893, within, 456
- PUBLIC AUTHORITIES PROTECTION ACT, 1893,
conduct within, 456-458
limitation of actions under, 459-461
proceedings within, 458, 459
protection afforded by, 445, 446, 458, 461
- PUBLIC CONVENIENCES, 510
- PUBLIC CORPORATIONS, 4-8
- PUBLIC HEALTH,
administration of, 492, 493
central control over, 30, 39, 40, 340, 341, 353-358, 361, 362, 486, 487,
489
default powers over, 361, 362, 364, 493, 494
extension of, 470, 471, 490, 491
finance of, 493
grants in aid of, 177, 181, 567
joint boards for, 146, 477
local authorities for, 31, 32, 489-493
Metropolis, in, 262, 491
poor law, relation to, 484, 485, 675
urban and rural areas, powers in, 51, 488, 489, 490, 492
- PUBLIC LIBRARIES,
acquisition of land for, 735
county council's powers as to, 733, 734

Index

PUBLIC LIBRARIES—*continued*.

expenses of, 731, 732, 734
history of, 731-733
local authorities for, 731, 734
provision of, 48, 734, 735

PUBLIC SERVICE VEHICLE,

licences, 774-777

PUBLIC USER OF WAY,

Rights of Way Act, 1932, under, 576-578

PUBLIC UTILITIES,

Clauses Acts, and, 742, 743
control by local authorities over, 739, 740
statutory regulation of, 740-742

PUBLIC WORKS FACILITIES ACT, 1930,

acquisition of powers under, 315, 316
compulsory purchase under, 234, 235

Q

QUALIFICATION,

aldermen, to be, 53, 61, 88
councillors, to be, 100
electoral franchise, for, 96
electors, to be, 95
local authorities, for election to, 99, 100
proceedings to question, 115-120, 376, 388, 389

QUARTER SESSIONS,

administrative functions of, 19-21, 369, 370
county councils, transfer to, 31, 52, 54, 243
appeal to, assessment committee, from, 160, 161
new streets, as to, 399
poor law removal, against, 688
areas of, 241, 242
boroughs, of, composition of, 249
grant of, 58, 242, 248
revocation of, 252
City of London, in, jurisdiction of, 260
counties of cities and towns, of, grant of, 242
county, area of jurisdiction, 56, 241
composition of, 249
costs of, payment of, 240, 244
functions of, 243
jurisdiction in boroughs of, 245, 250
history of, 20, 21, 241, 243, 244

QUINQUENNIAL REVALUATION, 158

QUO WARRANTO,

information in the nature of, 118, 119, 387, 388
supersession of, 119, 376 *n.*, 385, 387-389

QUORUM,

council meetings, at, 129

R

RAILWAY,

- assessment of, 155 *n.*, 157, 158
- level crossings, 759
- police, 658

RATEABLE OCCUPATION, 154, 155

RATEABLE VALUE, 154, 156-158

RATES,

- compounding arrangements for, 169
- county boroughs, in, 246-248, 251, 252
 - parochial levy of, 153
- demand note for, 168, 169
- distress warrant for, issue of, 169
- equalisation in Metropolis of, 264-266, 268
- general, purpose of, 166, 167, 493
- history of, 17, 18, 25-27, 30, 152-157, 642
- incidence of, 153, 170, 171
- land drainage, for, 163 *n.*, 625-630, 634, 636, 637
- making and levying of, 163-169
- Metropolis, in, 264, 265
- special, 156 *n.*, 167, 168, 190, 493
- uniformity of, 164, 166
- water, 750, 755

RATING. *See also* ASSESSMENT ; RATES

- appeal, 160, 161
- areas, extent of, 153
- authorities, assessment committees as, 159, 160
 - duties of, 153, 160, 162, 163, 165-169
 - Metropolis, in, 263, 264
- franchise, relation to, 26, 98, 99, 151
- Metropolis, in, 264-266

RECORDER,

- borough, of, appointment of, 249
 - disqualification of, 102
- City of London, of, election of, 260

RECREATIONAL FACILITIES,

- appropriation of land for, 514
- grants in aid of, 189, 515, 737
- schools, at, provision for, 695, 720, 737

RE-DEVELOPMENT, 529, 530, 537, 565-567

REFUSE,

- bins in streets, provision of, 607
- removal of, 509, 553

REGISTER OF ELECTORS, 94, 95

REGISTRATION,

- births and deaths, of, 32 *n.*
- clubs, of, 783
- elector, as, qualification for, 95, 96
- local land charges, of, 557
- nursing homes, of, 512, 780
- officer, 94

Index

- RELATORS,
actions for declaration and injunction, in, 381, 383
- RELIEVING OFFICER, 678, 680-682
- REMOVAL,
order, 688, 689, 692
poor law, in, 668, 688, 689, 692
- RESERVOIRS,
construction of, 617, 691
inspection of, 751
- RETURNING OFFICER,
borough, for, 109
county, disqualification of, 103
district council, of, 109
non-county borough, for, 109 *n.*
- RETURNS AND REPORTS,
local authorities, furnished by, 350
financial, 211, 212
police, 350 *n.*, 651, 653
poor law, 674
water supply, 752
- RIBBON DEVELOPMENT,
restriction of, 411, 574, 575
compensation under, 575, 605
grants in aid of, 605
trunk roads, in, 604, 605
- RIPARIAN OWNER,
flow of water, rights as to, 617
- RIVERS AND STREAMS,
discharge of sewage into, 507
pollution prevention. *See* POLLUTION OF RIVERS
public, rights of the, 617, 618
riparian owner, rights of, 617
- ROAD,
county. *See* COUNTY ROADS
fund, creation of, 180 *n.*
main. *See* MAIN ROADS
new, grants in aid of, 181
trunk. *See* TRUNK ROADS
- ROAD SERVICE LICENCE,
conditions attached to, 776, 777
- ROBBERIES,
hundred, liability of, for, 10, 639, 642
- ROYAL ASSENT,
general Bill, to, 293
local Bill, to, 307
Public Works Facilities Act, 1930, under, 316
- ROYAL COMMISSION,
Distribution of the Industrial Population, on, 567
Housing of the Working Classes, on, 517

Index

ROYAL COMMISSION—*continued.*

- Land Drainage, on, 631
- Local Government (1922), on, 73, 74
- London Government, on, 268, 269
- Sanitation (1871), on, 30, 481, 488, 489

RULE OF LAW,

- history of, 403-405
- inroads upon, 406, 429-432, 455

RULES,

- tabling of, 325, 326
- use of, 318

RULES PUBLICATION ACT, 1893,

- procedure under, 336
- provisional rules under, 336, 337
- publication under, 337
- statutory rules under, 335

RURAL DISTRICT,

- administration of, 35, 41, 49
- alteration of boundaries of, 82
- creation of, 77, 82, 490
- division of, 36, 41, 42, 76
 - wards, into, 82, 97
- union of, 76
- urban district, conversion into, 77
- bye-laws, power to make, 215

RURAL DISTRICT COUNCIL,

- creation of, 32, 468, 490
- default by, local inquiry by county council on, 362
 - transfer of functions on, 362, 366, 533
- elections to, 50, 109
- functions of, 51, 52
- general exchequer grant of, 187
 - rate fund of, 196
- history of, 32, 49, 50-52, 490
- hospitals, provision of, 512
- parochial committees of, 143, 144
- promotion of or opposition to legislation by, 298, 299
- supplementary exchequer grant of, 188
- urban powers conferred on, 349 *n.*, 490, 492

RURAL DISTRICT COUNCILLORS,

- absence of, effect of, 107, 108
- death of, 107
- disqualified, becoming, 107
- election of, 50, 82
- resignation of, 107
- retirement of, 50, 90
- term of office of, 50, 90, 92, 93

RURAL PARISH,

- division into wards of, 97
- functions of, 47
- government of, 42
- highway duties of, 593

Index

RURAL PARISH—*continued*.

- organisation of, 32, 35, 44-47
- public health functions of, 490, 492, 511
- statutory corporation, is, 47
- water supply, provision in, 48

RURAL SANITARY AUTHORITIES, 32, 297, 489

RURAL SANITARY DISTRICTS, 29, 31, 32, 49, 489

S

SANITARY ACCOMMODATION, 500, 502, 509, 510

SANITARY AUTHORITIES, 176, 353-356, 622, 623

SANITARY BYE-LAWS, 215, 216

SANITARY INSPECTOR,

- appointment of, 51, 61, 124, 353, 355
- central control over, 353-356
- dismissal of, 125, 126, 355, 356, 487
- duties of, 353, 355, 356
- grants in aid of salary of, 176, 177, 353-356
- qualifications of, 353, 355
- salary of, 125, 126, 353, 355
- tenure of office of, 125, 353, 355, 356

SANITATION, 172, 502-510

SCHEMES,

- air-raid precautions, for, 348 *n.*, 662
- approval of, 316, 348
- drainage works, for, 636
- education, for, 147, 706
- fire service, for, 664
- hospital accommodation, for, 512
- land drainage, for, 633, 634
- poor law, for, 674-676
- statutory, approval of, 478

SCHOLARSHIPS,

- elementary education, for, 722, 723
- higher education, for, 725

SCHOOL,

- aided, 699, 709-712
- art, for, provision of, 735
- controlled, 199, 700, 709, 710
- leaving age, raising of, 695
- non-provided. *See* NON-PROVIDED SCHOOL
- nursery, grants in aid of, 723
- provided, 697, 699
- public elementary, maintenance of, 708, 709
- special, 716
 - agreement, 699, 700, 709-712
- Sunday, voluntary attendance at, 699
- voluntary. *See* VOLUNTARY SCHOOLS

Index

- SCHOOL ATTENDANCE,
 - bye-laws as to, 701
 - compulsory, 701
- SCHOOL ATTENDANCE COMMITTEE, 29, 32, 697, 701, 704
- SCHOOL BOARD,
 - abolition of, 704
 - body corporate, is, 700
 - precept of, 700
- SCHOOL MEDICAL SERVICE, 718-720
- SCIRE FACIAS,
 - writ of, charter, to revoke, 284
- SEALING,
 - appointment of officers, of, 450
 - contracts of local authorities, of, 449-455
- SEATS,
 - streets, in, provision of, 607
- SECONDARY SCHOOLS,
 - aided, secular instruction in, control of, 709
 - governors of, number of, 71
- SEPARATION OF POWERS,
 - doctrine of, 307, 402, 432, 433
- SERVANT,
 - appointment of, 450
 - master and, relation of, application to local authority of, 438-440
- SERVICES,
 - administration of, 4-8, 476-478
 - electricity, surplus from, application of, 152
 - extension of, 133, 466-476
 - State, 3-5
 - transport, Minister of War Transport's control over, 39
- SETTLEMENT (POOR LAW), 668, 687-691
- SEWAGE,
 - disposal of, 503, 506, 507
 - rivers, discharge into, 507, 620, 623
- SEWERS,
 - cost of, county council contribution to, 168, 493, 506
 - discontinuance of, 507
 - drains, connection of, with, 507
 - injurious substances in, 507, 508
 - inter-connection of, 507
 - land drainage, for, 625
 - planning schemes for, 553
 - private, 505, 506
 - provision of, 503, 506, 509
 - public, 505, 506
 - repair of, 503-508
 - right to drain into, 507, 508
 - trade effluents, discharge of, into, 507, 508
 - vesting in local authorities of, 503-506
 - what are, 503, 504, 623

Index

- SHERIFFS,
 boroughs, of, 58, 103, 242, 245
 City of London, of, election of, 259
 counties of cities and towns, of, 103
 county, 9, 10, 16, 240, 241, 243
- SHERIFF'S TOWN, 11, 639, 640 .
- SLAUGHTERHOUSES, 749
- SLUM CLEARANCE,
 allowances to occupiers in, 523, 528, 529
 compensation for, 527-529
 history of, 471-473
 procedure on, 523-530
 re-housing, for, 531
 scheme for, confirmation of, 414
- SMALL DWELLINGS ACQUISITION,
 loans for, 540, 541
- SMALL HOLDINGS,
 grants in aid of, 177
- SMOKE ABATEMENT, 476 .
- SOCIAL WELFARE,
 administration of, 675
 committee, appointment of, 676
 duties and powers of, 675, 676
- SPECIAL,
 constables. *See* SPECIAL CONSTABLE
 county purposes, expenses for, 165, 198
 expenses, 168, 196, 197
 justices' licences, removal of, 790
 orders, Minister of Transport, of, 314 *n.*
 town and country planning, in case of, 325 *n.*
 purpose area, 142, 167 *n.*, 493
 sessions, 19, 584
- SPECIAL CONSTABLE, 645, 646
- SPIRITS,
 licences for sale of, 781
- STAGE PLAYS,
 licensing of, 779
- STALLAGE, 745, 748
- STANDARD WIDTH, 364 *n.*, 574, 605
- STANDING JOINT COMMITTEE ,
 administration of justice, power as to, 244
 appointment and composition of, 136, 144, 244, 647
 financial powers of, 139, 648
 functions of, 244
 police powers of, 54, 139, 144, 647, 648
 statutory committee, as, 144
- STANDING ORDERS,
 Houses of Parliament, of, local Bills, as to, 194, 301-307
 provisional orders, 313
 Public Works Facilities Act, 1930, under,
 316
 local authorities, of, 146, 213, 449-451

Index

- STANDING ORDERS COMMITTEE, 303
- STATUTES. *See* ACT OF PARLIAMENT ; CLAUSES ACTS ; LOCAL ACTS
- STATUTORY APPEALS,
 - delegated legislation, from, 333-335
 - district auditor, from, 205-207, 386, 411, 412
 - High Court, to, 399, 400, 417, 435
 - justices of the peace, to, 398
 - quarter sessions, to, 399
- STATUTORY RULES, 335, 336
- STATUTORY RULES AND ORDERS,
 - publication of, 337
- STIPENDIARY MAGISTRATES, 252, 253, 271
- STOCK,
 - loans by issue of, 193
- STOPPING UP OF HIGHWAYS, 579-581, 586, 593
- STREET LIGHTING,
 - liability for failure to provide, 444
- STREET REFUGE,
 - defective state of, liability for, 447
- STREET TRADING,
 - children, by, 721, 722
- STREETS,
 - adoption of, 596, 599-601
 - alteration of level of, 574
 - name of, 604
 - breaking up of, 572, 741, 742, 754, 758, 760, 765
 - building lines in, 553, 603
 - buildings in, 602, 603
 - cleansing of, 509
 - excavations under, 572
 - fire alarms and hydrants in, 665
 - highways, relation to, 569, 570
 - history of, 586-589
 - lighting of, 48, 168 *n.*, 294, 295, 553, 606, 607, 756, 757
 - local authorities, vesting in, 573
 - maintenance of, 595-600
 - Metropolis, in, 256, 258
 - numbering houses in, 607
 - public health provision as to, 515
 - refuges in, 607
 - trees overhanging, removal of, 608
 - watering of, 509
 - what are, 596, 597
- SUB-COMMITTEES,
 - delegation to, 140
 - disability of members of, 123
- SUNDAY SCHOOL,
 - voluntary attendance at, 699
- SUPERANNUATION,
 - officers, of, 126, 400
 - teachers, of, 126, 731

Index

- SUPERINTENDENT,
 county police force, of, appointment of, 647
- SUPPLEMENTARY EXCHEQUER GRANTS, 188, 268
- SURCHARGE,
 appeal from, 205-207, 359, 400, 412
 disqualification for, 105, 207, 208
 functions of, 203, 204
 remission of, 207, 359, 412
 time for payment of, 207
- SURVEYOR,
 appointment of, 21, 51, 56, 61, 124, 587
 highways, of, 18, 446, 583, 586-588
- SWIMMING BATHS, 510, 511, 720, 737

T

- TAVERNS,
 nuisances in, 780
- TAXATION,
 incidence of, principle underlying, 170, 171
- TEACHERS,
 appointment of, 713, 714, 730
 dismissal of, 713, 714
 liability of local education authority for acts of, 440
 salaries of, 348
 superannuation of, 126, 731
 training of, grants for, 730
- TELEGRAPH
 wires, bye-laws as to, 217 *n.*
- TENDER,
 Public Authorities Protection Act, 1893, under, 461
- THAMES CONSERVANCY,
 drainage board, as 632 *n.*
 jurisdiction of, extent of, 273
- THEATRES,
 licensing of, 779
- TITHE RENTCHARGE,
 abolition of, 168 *n.*
 grant payable on, 189
- TOLLS,
 market, 744, 745, 748
- TORT,
 Crown, by or on behalf of, 372, 373
 local authorities, application of general law to, 375, 376, 437-439
 liability of, 370, 373, 374, 437-447
 non-feasance and mis-feasance, by, 446, 447
 officer of local authority, by, 438-440
 Public Authorities Protection Act, 1893, within, 457
 ultra vires, liability for, 438

Index

TOWN AND COUNTRY PLANNING,

- acquisition of land for, 550, 558, 564
- area planned, 546, 548, 553, 555
- areas for, 36, 37, 477, 553
- betterment under, 555, 563
- compensation under, 548, 551, 554, 556-558
- default powers over, 363, 565
- external appearance of buildings, regulation of, under, 553, 563
- history of, 542-548
- housing, relation to, 545, 547, 548
- interim development, 552, 553, 557-561
- leases, restriction on, 551
- local authorities for, 546, 547, 552
- Minister of Health, powers of, over, 320 *n.*, 363, 546-553
- Town and Country Planning, powers of, over, 556, 558
- resolution to prepare or adopt scheme, 555-557
- responsible authority for, 477, 546, 555, 556, 563, 564
- war damaged land, development of, 550
- licences for, 551, 552
- legislation, 549-552

TOWN CLERK,

- appointment of, 61, 125 *n.*, 450
- registration officer, as, 94

TOWN'S MEETING, 299, 300

TOWNSHIP,

- police duties of, 639-641

TRADE,

- offensive, bye-laws as to, 218, 224 *n.*

TRADE EFFLUENTS,

- bye-laws, 218, 508
- pollution of rivers by, 620-623
- sewers, discharge into, 507, 508, 622

TRADE REFUSE,

- removal of, 509

TRADING CORPORATIONS,

- contracts of 452, 453

TRADING SERVICES,

- Clauses Acts for, 742, 743
- development of, 133, 468-470, 739, 740
- electricity, 763-771
- gas, 469, 756-758
- interference with highway for, 741, 742
- markets, 469, 743-750
- Public Authorities Protection Act, 1893, within, 455, 457
- statutory regulation of, 740-743
- transport, 469, 759-762
- water, 469, 750-755
- what are, 739

TRAFFIC AREAS, 774, 775

TRAFFIC COMMISSIONERS,

- appointment of, 775
- licensing authorities, as, 37
- omnibuses run by local authority, consent to, 762

Index

TRAMWAYS,

- abandonment of, 761
- acquisition by local authority of, 761
- construction of, 760, 761
- development of, 469
- lease by local authority of, 760-762
- Light Railways Act, under, 763
- loans for, 192, 762
- omnibuses, power to run, 762
- pre-emption, local authorities right of, 261
- provisional order for, 760, 761
- running by local authorities' of, 761
- user of highway by, 759, 760

TRANSPORT

- grants in aid of, 567
- services, central control over, 39, 469
- trading service, as, 759

TRAVELLING EXPENSES, 239

TREASURER,

- borough, appointment of, 61, 124, 125 *n.*, 127
 - contributions paid to county treasurer by, 246-248
 - duties of, 127, 197, 198, 209, 289
- county, appointment of, 21, 56, 124, 125 *n.*, 244
 - duties of, 198, 199, 244
 - legal position of, 127
- district council, of, appointment of, 51, 124, 125 *n.*
- parish council, of, appointment of, 48

TREATING,

- elections, at, 115

TRINODA NECESSITAS, 581, 609

TRUNK ROADS,

- authority for, 37, 183, 592, 593
- bridges in, 614
- lighting of, 607, 757
- restriction of ribbon development, 604, 605

TUBERCULOSIS, 512

TURNPIKE ROADS,

- bridges in, 611
- dis-turnpiking of, effect of, 589

TURNPIKE TRUSTS, 25, 585, 586

U

ULTRA VIRES,

- acts, actions for declaration and injunction in respect of, 379, 381
- bye-laws, 221
- common law corporations and doctrine of, 284-286
- contracts, 286, 448, 449
- delegated legislation, 322, 323
 - clauses excluding question of, 327-332, 334

Index

ULTRA VIRES—continued.

- exercise of judicial functions, 395, 414, 415, 422
- local authorities, application of doctrine to, 285-291
- statutory corporations and doctrine of, 285, 286
- torts, liability for, 438

UNCLASSIFIED ROADS, 591, 594

UNDUE INFLUENCE,

- elections, at, 115

UNEMPLOYED PERSONS,

- poor relief to, 683

UNEMPLOYMENT,

- distress committee for, 473
- Labour Exchanges for, 474
- relief works, 474, 475

UNEMPLOYMENT ASSISTANCE BOARD, 5, 7, 37, 39 *ii.*, 183, 683

UNFIT HOUSES, 520-530

UNITED DISTRICT,

- joint board, governed by, 146, 477, 492

UNSOUND FOOD,

- analysis of, 497, 498

URBAN DISTRICT,

- administration of, 41
- adoption of Public Adoptive Acts by, 732
- alteration of boundaries of, 77, 82
- creation of, 77
- division of, 75, 82, 97, 493
- electoral area for, 97
- highway authority, as, 594
- history of, 489, 588
- unemployment distress committee for, 473
- union of, 76

URBAN DISTRICT COUNCIL,

- bye-laws, 215, 216
- composition of, 50
- corporate body, as, 50, 282
- creation of, 32, 468, 489
- elections to, 50, 109
- food and drugs authority, as, 497
- functions of, 51, 52
- general exchequer grant of, 187
- rate fund of, 196
- promotion of or opposition to legislation by, 297-301
- public health authority, as, 51
- rating authority, as, 51
- supplementary exchequer grant of, 188

URBAN DISTRICT COUNCILLORS,

- alteration of number of, 82
- apportionment among wards of, 82
- election of, 50

Index

URBAN DISTRICT COUNCILLORS—*continued*.

- resignation of, 107
- retirement of, 50, 90
- term of office of, 50, 90, 92, 93

URBAN SANITARY AUTHORITIES,

- highway authorities, as, 588
- urban district councils, becoming, 32, 489

URBAN SANITARY DISTRICTS, 49, 489

V

VACATION OF OFFICE,

- absence, by, 107
- alderman, by election as, 53, 61 *n.*, 108
- amotion, by, 131
- ceasing to be qualified, by, 107
- death, by, 107
- disqualification, by, 105, 107
- election petition, on, 117
- penalty for acting after, 119, 120
- proceedings to question, 119, 120, 376, 388, 389
- resignation, by, 107

VALUATION. *See* ASSESSMENT

VALUATION LIST,

- draft, 159, 160, 163
- preparation of, 158
- quinquennial revaluations, 158
- substantive, 160, 163

VESTING,

- highways and streets, of, 573
- sewers, of, 503-506
- water supply, of source of, 755

VESTRY,

- history of, 16, 17
- metropolitan, 257, 258
- open, 16, 17
- select, Metropolis, in, creation of, 257
- nature of, 17
- transfer of powers of, 44, 349, 489

VICARIOUS LIABILITY,

- local authorities, of, 437, 438

VILL, 10, 11, 13

VILLAGE GREENS, 48

VOLUNTARY HOSPITALS,

- arrangements between local authorities and, 512

VOLUNTARY SCHOOLS,

- classification of, 699, 709, 712
- governors for, 710

Index

VOLUNTARY SCHOOLS—*continued*.

- managers for, appointment of, 710
- religious instruction in, 699, 709
- schools comprising, 699

VOTING,

- county councillors, disqualification of, from, 165 *n.*
- meetings of local authorities, at, 129, 139 *n.*, 165 *n.*
- paper, adjudication on, 111, 112

W

WAR DAMAGED AREAS,

- planning of licensed premises in, 792

WAR DAMAGED HOUSES,

- repair of, 520

WARDMOTE, 260

WARDS,

- borough, of, alteration of, 60 *n.*, 80, 82
 - apportionment of councillors among, 60, 81
 - defined in charter, 71
 - division of borough into, 60 *n.*, 81, 97
 - returning officer for, 109
- City of London, of, number of, 259
- county districts, of, alteration of, 82
 - apportionment of councillors among, 82
 - division of district into, 82, 83, 97
- parish, of, parish councillors, for election of, 83, 97
 - rural district councillors, for election of, 82, 97
- rural districts, of, alteration of, prohibition of, 83
- urban districts, of, alteration of, 82
 - apportionment of councillors among, 82

WASH HOUSES,

- provision of, 48, 510, 511

WATCH AND WARD, 642

WATCH COMMITTEE,

- appointment of, 135, 649
- composition of, 137, 649
- duties of, 649, 650
- police powers of, 139, 409, 649-651

WATCHMEN,

- appointment of, 642
- City of London, in, 643, 644

WATER SUPPLY,

- administration by joint boards of, 477
- bye-laws for, 218 *n.*, 224, 224 *n.*
- charges for, 750, 752-755
- cost of, county council contribution to, 168, 493, 753, 754
- development of, 469, 750, 751
- joint boards for, 146, 752

Index

WATER SUPPLY—*continued.*

- local Acts for, 751
- organisations for, 752
- Minister of Health, duties of, as to, 751, 752
- new code for, 751
- planning schemes for, 553
- provision of supply, 753-755
 - works for, 754
- reservoirs for, 751, 754
- returns and reports as to, 752
- rural areas, in, 48
- sources of, closing of, 755
 - vesting of, 755
- supply in bulk, 754
- surveys respecting, 752

WEIGHTED POPULATION,

- formula of, 184-187, 189
- Metropolis, application in, of, 266

WINE LICENCES, 781

WOMEN,

- committees, as members of, 137
- constables, 658
- local authorities, representation on, 133

WORKSHOP,

- rateable value of, 157

Z

ZONING,

- town and country planning, in respect of, 544, 554